DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-564
Title: Florida, Petitioner
v.
Joelis Jardines
Docketed: November 4, 2011
Linked with 11A348
Lower Ct: Supreme Court of Florida
Case Nos.: (SC08-2101)
Decision Date: April 14, 2011
Rehearing Denied: July 7, 2011
Discretionary Court
Decision Date: October 22, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Sep 26 2011	Application (11A348) to extend the time to file a petition for a writ of certiorari from October 5, 2011 to October 27, 2011, submitted to Justice Thomas.
Oct 5 2011	Application (11A348) granted by Justice Thomas extending the time to file until October 27, 2011.
Oct 26 2011	Petition for a writ of certiorari filed. (Response due December 5, 2011)
Oct 26 2011	Appendix of Florida filed.
Dec 2 2011	Brief of respondent Joelis Jardines in opposition filed.
Dec 2 2011	Motion for leave to proceed in forma pauperis filed by respondent.
Dec 5 2011	Brief amici curiae of Texas, et al. filed.
Dec 14 2011	DISTRIBUTED for Conference of January 6, 2012.
Dec 15 2011	Reply of petitioner Florida filed. (Distributed)
Jan 6 2012	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 6 2012	Petition GRANTED limited to Question 1 presented by the petition.
Jan 23 2012	Brief amicus curiae of Wayne County, Michigan filed.
Feb 17 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including March 22, 2012.
Mar 21 2012	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including April 26, 2012.
Apr 26 2012	Joint appendix filed.
Apr 26 2012	Brief of petitioner Florida filed.
Apr 27 2012	Brief amici curiae of National Police Canine Association and Police K-9 Magazine filed.
May 3 2012	Brief amicus curiae of the United States filed.

May 3 2012	Brief amici curiae of Texas, et al. filed.
May 11 2012	The time to file respondent's brief on the merits is extended to and including June 25, 2012.
Jun 25 2012	Brief of respondent Joelis Jardines filed.
Jul 2 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 2 2012	Brief amicus curiae of Cato Institute filed.
Jul 2 2012	Brief amici curiae of Fourth Amendment Scholars filed.
Jul 2 2012	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jul 2 2012	Brief amicus curiae of Rutherford Institute filed.
Jul 16 2012	Application (12A54) to extend the time to file a reply brief on the merits from July 25, 2012 to August 9, 2012, submitted to Justice Thomas.
Jul 18 2012	Application (12A54) denied by Justice Thomas.
Jul 23 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jul 23 2012	SET FOR ARGUMENT ON Wednesday, October 31, 2012.
Jul 25 2012	Reply of petitioner Florida filed. (Distributed)
Aug 2 2012	CIRCULATED
Aug 22 2012	Record received from Supreme Court of Florida. (1box)
Oct 31 2012	Argued. For petitioner: Gregory G. Garre, Washington, D. C.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Howard K. Blumberg, Assistant Public Defender, Miami, Fla.

PETITION FOR WRIT OF CERTIORARI

11-564

Supreme Court, U.S.
FILED
OCT 25 2011
OFFICE OF THE CLERK

No.____

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,
v.
JOELIS JARDINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

PAMELA JO BONDI
Attorney General of Florida
Tallahassee, Florida

Carolyn M. Snurkowski*
Associate Deputy Attorney General
Carolyn.Snurkowski@myfloridalegal.com

Charmaine M. Millsaps
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
Counsel for State of Florida
*Counsel of Record

QUESTIONS PRESENTED

I. Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?

II. Whether the officers' conduct during the investigation of the grow house, including remaining outside the house awaiting a search warrant is, itself, a Fourth Amendment search?

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No._____

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

The State of Florida respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The Florida Supreme Court's opinion is reported at *Jardines v. State*, · So.3d ·, 2011 WL 1405080 (Fla. April 14, 2011). (App. A, *infra*, A·1 — A·97). The Florida Supreme Court denied rehearing, in an unpublished order, on July 7, 2011. (App. A, *infra*, A·98). The decision of the intermediate appellate court is reported at *State v. Jardines*, 9 So.3d 1 (Fla. 3d DCA 2008). (App. A, *infra*, A·99 —

A-135). The trial court's order granting the motion to suppress is unreported. (App. A, *infra*, A-136 — A-139).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Florida Supreme Court issued its decision on April 14, 2011. The State filed a motion for rehearing. The Florida Supreme Court denied rehearing on July 7, 2011. *See* Sup. Ct. R. 13.3 (providing: ". . .if a petition for rehearing is timely filed in the lower court by any party . . ., the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment). The State of Florida sought, and was granted, a motion for extension of time to file this petition until October 27, 2011. *Florida v. Jardines*, No. 11A348.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitutional provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The searches and seizure provision of the Florida Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Art. I, § 12, Fla. Const.

STATEMENT OF THE CASE

The Miami-Dade Police Department received a Crime Stoppers tip that Jardines was growing marijuana in his house. About a month later, on December 6, 2006, at 7:00 a.m., Detective Pedraja, along with a drug task force that included several agents of the United States Drug Enforcement Agency, conducted surveillance at Jardines' house. After observing no activity at the house, canine officer Detective Bartlet, with his leashed narcotics dog, Franky, and Detective Pedraja, in that order, using the sidewalk, went to the front porch of the house. Franky alerted at the front door. At that point, the canine officer and the dog left.

Detective Pedraja then knocked on the front door to obtain consent to search. There was no response. He then personally smelled the odor of marijuana. Detective Pedraja also noticed the air conditioning running constantly for fifteen minutes, which, in his experience, is a sign of a grow house. While the task force remained behind in public areas to secure the scene, Detective Pedraja went to obtain a search warrant.

Detective Pedraja prepared and submitted an affidavit containing all this information, including the fact that Franky had alerted, to Miami-Dade County Court Judge Sarduy. *See State v. Jardines*, 9 So.3d 1, 3 (Fla. 3d DCA 2008)(quoting the affidavit submitted at length). The magistrate issued a search warrant for Jardines' house and the subsequent

search, authorized by the warrant, confirmed that the house was being used as a grow house. The officers seized numerous live marijuana plants. A DEA agent arrested Jardines as he attempted to flee through a rear door of the house.

A. Trial Proceedings

Jardines was subsequently charged with 1) trafficking in excess of 25 pounds of cannabis, a first-degree felony, and 2) grand theft for stealing over five thousand dollars of electricity from Florida Power & Light to grow the marijuana, a third-degree felony. Jardines moved to suppress the evidence seized from his grow house asserting that the dog sniff of a house violates the Fourth Amendment relying on *State v. Rabb*, 920 So.2d 1175 (Fla. App. Ct. 2006) and *Kyllo v. United States*, 533 U.S. 27 (2001).[1] Jardines also asserted that Detective

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[1] The Fourth District Court of Appeals of Florida's original decision in *State v. Rabb*, 881 So.2d 587 (Fla. App. Ct. 2004), was remanded by this Court for reconsideration in light of this Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005). See *Florida v. Rabb*, 544 U.S. 1028 (2005)(No. 04-914). On remand from this Court, the Fourth District again held that a dog sniff of a front door of a house was a search. *State v. Rabb*, 920 So.2d 1175,1192 (Fla. App. Ct. 2006)(observing that "the Fourth Amendment remains decidedly about 'place,' and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life" and rejecting *Caballes*). Certiorari review of the second opinion was denied in *Florida v. Rabb*, 549 U.S. 1052 (2006)(No. 06-309).

Pedraja's smelling the marijuana was impermissibly tainted by the dog's prior sniff. At the suppression hearing both Detective Pedraja and the canine officer, Detective Bartlet, testified.

Detective Pedraja testified that he approached the front door of Jardines' house at 7:15 a.m. behind Detective Bartlet and his narcotics dog, Franky. The canine officer, Detective Bartlet, reported that Franky had alerted. After the canine officer and dog left, Detective Pedraja went to the front door and "smelled the scent of live marijuana." He knocked several times on the front door but there was no response. Detective Pedraja then left to obtain a search warrant.

Detective Pedraja testified that he had been dealing with hydroponic grow lab cases for four years. He testified that it was typical for grow house operations not to have a high volume of traffic of cars and people. He testified that the significance of the air conditioning running constantly was that, in hydroponic lab operations, high intensity light bulbs are employed to mimic daylight to make the marijuana plants grow more rapidly, which creates heat that must be cooled by keeping the air conditioner running constantly.[2] He also testified

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[2] While an air conditioner running in Miami is quite normal during most of the year, this was in December and in the early morning. Justice Lewis ignored these crucial facts in his concurring opinion. *Jardines v. State*, 2011 WL 1405080, *20 (Fla. 2011)(Lewis, J., concurring)(stating that if "a continuously

that he did not attempt to obtain a subpoena for the electric bills because a lot of grow house operations have a diversion where they steal the electricity, so their electric bills do not show excessive usage.

Detective Bartlet of the canine section of the Miami-Dade Police Department testified that he had been a canine handler for three years. He and his canine partner, Franky, who was on a leash, approached the front porch of the house via the driveway. Once on the front porch, Franky started tracking. Franky, trained to go to the strongest point of the odor or the source, alerted by sitting down immediately after sniffing the base of the front door. Detective Bartlet informed Detective Pedraja that Franky alerted. Detective Bartlet and Franky then returned to the car where he prepared the necessary information regarding the dog's training and statistical information to use in the affidavit to secure a search warrant. He and the dog then left to assist in other cases. Detective Bartlet and Franky were at the scene for approximately ten minutes.

The trial court granted the motion to suppress relying on *State v. Rabb*, 920 So.2d 1175 (Fla. App. Ct. 2006). The trial court concluded that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search." The

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running air conditioner is indicative of marijuana cultivation, then most Florida citizens and certainly all of my neighbors would be suspected drug dealers . . .).

trial court in a footnote discounted the detective smelling the marijuana also because "this information was only confirming what the detection dog had already revealed." The trial court determined that the remainder of the information including the anonymous tip and the air conditioner running constantly was insufficient to establish probable cause to issue a search warrant for the house.

B. Appellate proceedings

The State appealed the trial court's order granting the motion to suppress to the District Court of Appeal, Third District, a Florida intermediate appellate court. *State v. Jardines*, 9 So.3d 1 (Fla. Ct. App. 2008). The Third District reversed the trial court, finding the trial court erred in suppressing the marijuana obtained as a result of the search warrant. The intermediate appellate court concluded that "a canine sniff is not a Fourth Amendment search" and further found that "the officer and the dog were lawfully present at the defendant's front door."*Jardines*, 9 So.3d at 4. That court rejected *Rabb*, relying on this Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005), instead. The court, following this Court's reasoning in *Caballes*, explained that a dog sniff detects only contraband, and because no one has a "legitimate" privacy interest in contraband, a dog sniff is not a search under the Fourth Amendment.

The Third District distinguished *Kyllo v. United States*, 533 U.S. 27 (2001), as involving "the

use of a mechanical device which detected heat radiating from the walls of a home." The court explained that a "dog's nose is not, however, a 'device,' nor is it improved by technology" and noted that "dogs have been used to detect scents for centuries all without modification or 'improvement' to their noses." *Jardines*, 9 So.3d at 5. That court observed that "unlike the thermal imaging device at issue in *Kyllo*, a dog is trained to detect only illegal activity or contraband. It does not indiscriminately detect legal activity."*Jardines*, 9 So.3d at 5. It was these differences that had prompted the *Caballes* Court to find that its decision was consistent with *Kyllo*. *Jardines*, 9 So.3d at 5. The court also concluded that "the officer had every right to walk to the defendant's front door." *Jardines*, 9 So.3d at 7 (citing state cases). The Third District then certified direct conflict with the Fourth District's decision in *Rabb*. *Jardines*, 9 So.3d at 10.

The Florida Supreme Court accepted jurisdiction and reversed the Third District. The Florida Supreme Court concluded "that a 'sniff test,' such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment." *Jardines*, 2011 WL 1405080 at *1. The Florida Supreme Court held that "[g]iven the special status accorded a citizen's home under the Fourth Amendment, we conclude that a 'sniff test,' such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home

and constitutes a 'search' within the meaning of the Fourth Amendment." *Jardines*, 2011 WL 1405080 at *13. The Florida Supreme Court, rather than focusing on the dog sniff, focused on the officers' conduct, including the involvement of several federal law enforcement officers, referring to the officers' conduct as being a "public spectacle." *Jardines*, 2011 WL 1405080 at *1,*12. The Florida Supreme Court discussed this Court's decisions in *United States v. Place*, 462 U.S. 696 (1983), *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *Illinois v. Caballes*, 543 U.S. 405 (2005), but found those decisions to be inapplicable because none of those cases involved a dog sniff of a house. *Jardines*, 2011 WL 1405080 at *4-*13. The Florida Supreme Court relied on *Kyllo v. United States*, 533 U.S. 27 (2001), instead of *Caballes*. *Jardines*, 2011 WL 1405080 at *7-*8, *18. In conclusion, the Florida Supreme Court stated "[g]iven the special status accorded a citizen's home in Anglo–American jurisprudence, we hold that the warrantless 'sniff test' that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment." *Jardines*, 2011 WL 1405080 at 18.

Justice Polston, joined by Justice Canady, dissented, because "the majority's decision violates binding United States Supreme Court precedent." *Jardines*, 2011 WL 1405080 at *24 (Polston, J., dissenting). Justice Polston noted that under Florida's constitution, the Florida Supreme Court's search and seizure jurisprudence "must conform to

the United States Supreme Court's precedent interpreting the Fourth Amendment." *Jardines*, 2011 WL 1405080 at *25 (Polston, J., dissenting)(citing Art. I, § 12, Fla. Const.). Despite the majority's focus on the multiple officers and the time involved, he noted that it was "undisputed that one dog and two officers were lawfully and briefly present near the front door." *Jardines*, 2011 WL 1405080 at *24. "Franky the dog was lawfully present at Jardines' front door when he alerted to the presence of marijuana. And because, under the binding United States Supreme Court precedent described above, a dog sniff only reveals contraband in which there is no legitimate privacy interest, Franky's sniff cannot be considered a search violating the Fourth Amendment."*Jardines*, 2011 WL 1405080 at *29 (Polston, J., dissenting). Justice Polston explained that, under this Court's cases, there is "no legitimate privacy interests in contraband." *Jardines*, 2011 WL 1405080 at *29, *30 (Polston, J., dissenting). Consequently, he found that the dog sniff "cannot be considered a search in violation of the Fourth Amendment." *Jardines*, 2011 WL 1405080 at *25 (Polston, J., dissenting).

The State of Florida petitions this Court to review the Florida Supreme Court's decision in *Jardines* and reverse.

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court held that a dog sniff of a house is a Fourth Amendment search requiring probable cause. In so doing, the Florida Supreme Court created a new test for Fourth Amendment searches. The decision is erroneous and warrants review for three reasons.

First, the Florida Supreme Court's holding that a dog sniff is a search conflicts with the settled views of this Court and with the holdings of other federal circuit courts of appeals. The Florida Supreme Court ignored this Court's logic in *Illinois v. Caballes*, 543 U.S. 405 (2005), in its decision. This Court has explained that a dog sniff is not a search because the sole knowledge that the dog obtains by sniffing is the presence of contraband, which a person does not have a reasonable expectation of privacy in possessing in the first place. Florida courts are now alone in refusing to follow this Court's decision in *Caballes*.

Second, and equally troubling, is the Florida Supreme Court's creation of a new test for whether officers' conduct is a search. Seeking to avoid applying *Caballes*, the Florida Supreme Court fashioned a new test which focused on the surrounding circumstances rather than properly on the dog sniff itself. This new test, however, violates a plethora of this Court's Fourth Amendment cases. This Court should disavow the Florida Supreme Court's newly formulated Fourth Amendment test.

Third, law enforcement is significantly hampered if required to develop probable cause without the assistance of dogs. The Florida Supreme Court's decision requires that the officers have probable cause before employing a dog. It is the dog's alert, however, that often provides the probable cause to obtain the search warrant. This Court should grant certiorari to directly hold that a dog sniff of a house is not a search and to restore this valuable tool in the detection of numerous illegal and dangerous activities to law enforcement.

Florida's conformity clause

Under the Conformity Clause of the Florida Constitution, Florida courts are bound by United States Supreme Court precedent when deciding Fourth Amendment cases. See Art. I, § 12, Fla. Const. (providing that the state constitutional right "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."); *Florida v. Casal*, 462 U.S. 637, 638 (1983)(Burger, C.J., concurring in dismissing the writ as improvidently granted)(observing that Florida's conformity clause "ensures that the Florida courts will no longer be able to rely on the State Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States."). This provision means that there is no issue of a separate and independent state law in this case. And, under this provision, this Court's word on the matter of a dog sniff of a house

will be the final word. The *Jardines* decision deprives the citizens of Florida of the benefit of this democratically enacted provision meant to preclude the Florida Supreme Court from straying from this Court's Fourth Amendment jurisprudence. This Court granting certiorari review is the sole means the people of the State of Florida have of enforcing this provision.

I. The Florida Supreme Court's decision that a dog sniff is a search conflicts with this Court's views and the holdings of other federal circuit courts of appeals

The Florida Supreme Court's holding that a dog sniff is a search conflicts with this Court's repeated holdings, in various contexts, that a dog sniff is not a search. It conflicts with this Court's most recent explanation in *Caballes* extending that view to houses.

This Court's view of dog sniffs

This Court has repeatedly held that a dog sniff is not a search. In *United States v. Place*, 462 U.S. 696, 707 (1983), this Court held that a dog sniff of luggage at the airport is not a search because it is "much less intrusive than a typical search" which "discloses only the presence or absence of narcotics" and "no other investigative procedure is so limited both in the manner in which the information is obtained and in the content of the information

revealed." Likewise, in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), this Court held, in the alternative, that a dog sniff of a car does not transform the seizure into a search because the sniff does not "disclose any information other than the presence or absence of narcotics" and observing that "a dog that simply walks around a car is much less intrusive than a typical search"). And most recently in *Illinois v. Caballes*, 543 U.S. 405 (2005), this Court held that a dog sniff was not a Fourth Amendment search. This Court has repeatedly characterized dog sniffs as *sui generis* because it "discloses only the presence or absence of narcotics, a contraband item" *Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707). Indeed, this Court has chastised law enforcement for not employing dogs. *Florida v. Royer*, 460 U.S. 491, 506 (1983)(condemning Florida officers for not employing a dog instead of detaining a person, observing that if a dog had been used a "negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause.").

In *Illinois v. Caballes*, 543 U.S. 405 (2005), this Court held that a dog sniff of a car, during a routine traffic stop, was not a search. Caballes was stopped for speeding. A second trooper arrived with a narcotics detection dog. While the first trooper was writing a ticket, the second trooper walked the dog around the car. The dog alerted at the trunk of Caballes' car. The trooper searched the trunk and found marijuana. The Illinois Supreme Court had concluded that because the dog sniff was performed

without reasonable suspicion, the use of the dog turned a "routine traffic stop into a drug investigation." *Caballes*, 543 U.S. at 407.

This *Caballes* Court explained that, because there is no legitimate interest in possessing contraband, the use of a narcotics dog that only reveals the possession of narcotics compromises no legitimate privacy interest and does not violate the Fourth Amendment. As the *Caballes* Court explained, reaffirming this Court's long-standing view, a "canine sniff is *sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item." *Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707).

This Court reconciled its prior holding in *Kyllo v. United States*, 533 U.S. 27 (2001), which held that a thermal imagining of a grow house was a search. This Court found the result in *Caballes* "entirely consistent" with *Kyllo*, explaining:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38, 121

> S.Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-410.

This Court did not distinguish *Kyllo* on the basis that *Kyllo* involved a house. Rather, this Court distinguished *Kyllo* on the basis that *Caballes* involved a dog sniff. It was the nature of the dog's nose, not the area being searched, that mattered to this Court. A dog sniff of a house reveals only that the house contains drugs, not any other private information about the house or the persons in it. A 'search' only occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109, 122-123 (1984)(explaining that a test, including a dog sniff, that merely reveals whether a substance is cocaine, and no other private fact, compromises no legitimate privacy interest). Because a dog's alert tells the officer one thing, and one thing only - that the house contains illegal drugs - it cannot constitute a search. And this Court has repeatedly explained that a person has no reasonable expectation of

privacy in contraband. *United States v. Jacobsen*, 466 U.S. 109, 124, n.24 (1984)(explaining that the "interest in privately possessing cocaine" is "illegitimate" and limiting the exception to contraband). A person has no reasonable expectation of privacy in illegal drugs. Possessing contraband is not a protected privacy interest. And therefore, a dog sniff is not a search.

The Florida Supreme Court improperly relied on *Kyllo* rather than properly relying on this Court's latest pronouncement in *Caballes* limiting *Kyllo*. Since this Court has spoken in *Caballes*, reconciling *Kyllo*, no court has held that a dog sniff of a house is a search - until now. The Florida Supreme Court held that a dog sniff of the front door of a house is a violation of the Fourth Amendment despite this Court's views to the contrary in *Caballes*.

Conflict with federal circuit courts

In addition to conflicting with this Court's views of dog sniffs, the Florida Supreme Court's decision directly conflicts with the holding of two federal circuit court of appeals' decisions. Both the Seventh Circuit and the Eighth Circuit, in the post-*Caballes* era, have held that a dog sniff of a residence is not a search.

The Eighth Circuit in *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S.Ct. 964 (Jan 10, 2011)(No. 10-7745), recently held that a dog sniff of the front door of an apartment is not a

search because the dog sniff discloses only contraband. Officer Berg of the Iowa City Police brought his drug detection dog, Naton, into the hallway of the apartment building. Naton alerted on the front door of Scott's apartment. Based, in part, on the dog's alert, another officer obtained a search warrant for the apartment. On appeal, Scott asserted that *Kyllo* applied to dog sniffs of apartments. , 610 F.3d at 1015-1216. The Eighth Circuit explained that *Kyllo* does not apply to dog sniffs: "the Supreme Court rejected such an interpretation of *Kyllo* in *Caballes*." , 610 F.3d at 1016. The Eighth Circuit noted that, unlike the thermal imaging technology at issue in *Kyllo*, dog sniffs are not capable of detecting lawful activity. , 610 F.3d at 1016 (quoting *Caballes*, 543 U.S. at 409). The Eighth Circuit noted that the United States Supreme Court has treated dog sniffs as "sui generis" and did likewise. *Scott*, 610 F.3d at 1016 (quoting *Place*, 462 U.S. at 707). The Eighth Circuit found *Caballes* controlling and concluded that a dog's sniff at the apartment door was not a search.

The Seventh Circuit in *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005), has also held that the dog sniff at a locked bedroom door inside a house was not a search. A drug dog, Yoba, present in the house by consent, alerted while sniffing just outside Brock's locked bedroom. *Brock*, 417 F.3d at 693-694. Based, in part on the dog's alert, a judge issued a search warrant for Brock's bedroom. *Brock*, 417 F.3d at 694. On appeal, Brock argued that *Kyllo*, not *Caballes*, controlled. *Brock*, 417 F.3d at 695. The Seventh

Circuit held that the dog sniff inside a residence was not a Fourth Amendment search because it detected only the presence of contraband. The Seventh Circuit concluded that *Kyllo* did not support defendant's position because the Supreme Court had subsequently explained in *Caballes*, that it was essential to *Kyllo*'s holding that the imaging device was capable of detecting not only illegal activity inside the house, but also lawful activity, including such intimate details as "at what hour each night the lady of the house takes her daily sauna and bath." *Brock*, 417 F.3d at 696. The Seventh Circuit noted that most of their sister circuits have held likewise.[3]

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[3] *Brock*, 417 F.3d at 696 (citing numerous cases including *United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998)(concluding that where the canine team was lawfully present inside a home, the dog sniff itself was not a Fourth Amendment search) and *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997)(concluding that no warrant was needed to bring a trained dog into the hallway of a hotel to conduct a narcotics sniff). The Seventh Circuit stated that the Second Circuit's holding to the contrary in *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), which found "that a person has a reasonable expectation that even contraband items hidden in his dwelling place will not be revealed" is inconsistent with Supreme Court precedent and "has been rightly criticized." *Brock*, 417 F.3d at 697.

The Second Circuit's current view of a dog sniff of a house is not clear. Before this Court's decision in *Caballes*, the Second Circuit had held that a dog sniff outside an apartment was a search. *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985). After this Court's decision in *Caballes*, the Second Circuit distinguished *Thomas* and concluded that a dog sniff of a hedge in the backyard of a house was not a search. *United*

Additionally, there is conflict within the State of Florida between the state courts and the federal district courts. A federal district court in Florida has already disagreed with the Florida Supreme Court's legal analysis in *Jardines*. *United States v. Byle*, 2011 WL 1983355, *4 (M.D.Fla. May 20, 2011)(refusing to follow *Jardines*). The Middle District of Florida judge aptly observed that this Court "meant what it said - dog sniff is not a search." *Byle*, 2011 WL 1983355 at *4.

The Florida Supreme Court's observation in *Jardines* that the rulings of other state and federal courts regarding whether a dog sniff of a house was a search were "generally mixed" is not accurate in the wake of this Court's decision in *Caballes*. *Jardines*, 2011 WL 1405080 at *13 (collecting cases in the footnotes). Rather, Florida courts are alone in holding that a dog sniff of a house is a search under the Fourth Amendment after *Caballes*. No other courts have taken this view in the wake of *Caballes*.[4]

States v. Hayes, 551 F.3d 138, 142 (2d Cir. 2008). The *Hayes* panel, however, cited its prior holding in *Thomas*. *Hayes*, 551 F.3d at 145 (distinguishing *Thomas* because the drug were located outside the house, not inside the house). This Court granting review of this case would provide needed further guidance to the Second Circuit.

[4] While other courts, including the Second Circuit and the Nebraska Supreme Court, had held that a dog sniff of a house was a search prior to *Caballes*, no other court except Florida courts have held a dog sniff of a house is a Fourth Amendment search after *Caballes*. *State v. Ortiz*, 600 N.W.2d

Two officers and one dog

The Florida Supreme Court in *Jardines* stated that "such an intrusion into the sanctity of his or her home will generally be a frightening and harrowing experience" if the resident is at home at the time of the dog sniff. *Jardines*, 2011 WL 1405080 at *12. However, there was no physical intrusion into Jardines' grow house. Two officers and one dog walked to the front door. Neither officer nor the dog entered the house. No part of the dog entered the house - not his paws, not his whiskers, not his nose. The dog was, and remained at all times, outside of the house. All the officers remained outside of the house until a search warrant was obtained. It is physical entry of the home which "is the chief evil against which the wording of the Fourth Amendment is directed." *Michigan v. Summers*, 452 U.S. 692, 701, n.13 (1981)(citing *United States v. United States District Court*, 407 U.S. 297, 313 (1972)). All that

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805 (Neb. 1999) (holding that a dog sniff test outside an apartment is a search within the meaning of the Fourth Amendment); *United States v. Thomas*, 757 F.2d 1359 (2d Cir.1985) (holding that a dog "sniff test" outside an apartment is a "search" within the meaning of the Fourth Amendment). The Minnesota Supreme Court, in a post-*Caballes* case, has held that a dog sniff of a private residence is a search but as a matter of state constitutional law, not the Fourth Amendment. *State v. Davis*, 732 N.W.2d 173 (Minn. 2007)(holding that the police needed reasonable suspicion to conduct warrantless dog sniff in common hallway outside an apartment door under Minnesota's Constitution). Florida courts are alone in the wake of *Caballes*.

occurred here was that two officers and a dog went to the front door. As this Court recently observed, when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011). The Florida Supreme Court's conclusion that officers may not knock on the front door of a house lest they frighten the homeowner is contrary to *King*.

The Florida Supreme Court also overlooked the nature of the dog. A dog is a dog, not the rapidly "advancing technology" that concerned the *Kyllo* Court. *Kyllo*, 533 U.S. at 35-36 (noting that while the technology used "was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development."). Chocolate Labrador Retrievers are not "sophisticated systems." Rather, they are common household pets that possess a naturally strong sense of smell. Nor are dogs a recent development. Rather, they have been part of human communities for several millennia and were used at the time of the adoption of the Fourth Amendment in 1791. The *Kyllo* Court characterized the thermal imagining device at issue as "a device that is not in general public use." Dogs, in stark contrast, are not a device and are quite common. Nor was there a "vigorous search effort" at the front door; all Franky really did was breath. *Jardines*, 2011 WL 1405080 at *1, *12.

The Florida Supreme Court's reasoning in *Jardines* conflicts with this Court's reasoning in

Caballes. This Court has explained that *Kyllo* does not apply to dogs. The Florida Supreme Court refused to follow this Court's reasoning in *Caballes*. This Court should grant review and directly hold that a dog sniffing the air outside the front door of a house is not a search.

II. The Florida Supreme Court's new test for determining when official conduct constitutes a search conflicts with this Court's holdings for determining when official conduct constitutes a search

The Florida Supreme Court, in addition to holding that a dog sniff is a search, created a new Fourth Amendment test for whether conduct is a search based on whether the officer's conduct constitutes a "public spectacle" and is "dramatic government activity." The Florida Supreme Court looked at the surrounding circumstances to determine that the entire incident was a search. But most of the surrounding circumstances have been directly held by this Court not to constitute a search. This new "public spectacle" test violates a plethora of this Court's Fourth Amendment cases.

The new "public spectacle" test

The Florida Supreme Court found that such a "public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the

resident, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime." *Jardines*, 2011 WL 1405080 at *1. While this Court has considered the surrounding circumstances and the intrusiveness of the officer's conduct, it has never included whether the officer's conduct is a "spectacle" or "dramatic" as part of the calculus, much less the determining factor. Indeed, this Court has held much more dramatic conduct not to be a search. Flying an airplane over a suspect's backyard as part of an investigation was held not to be a search because the officer remained in a public area. *California v. Ciraolo*, 476 U.S. 207, 212 (1986)(explaining that an officer does not need a warrant to fly over a fenced back yard to see if marijuana is being grown because it is public airspace). This Court did not view whether the conduct of flying was "dramatic" as properly part of the Fourth Amendment analysis.

The Florida Supreme Court concluded that "such dramatic government activity in the eyes of many - neighbors, passers-by and the public at large - will be viewed as an official accusation of crime." *Jardines*, 2011 WL 1405080 at *1 & *12. All formal interaction that occurs in public between an officer and a suspect would meet this "test." Whether conduct is a search simply cannot turn on what the neighbors might think. This Court has never considered such a factor in its Fourth Amendment jurisprudence.

The Florida Supreme Court also found that the dog sniff was "an intrusive procedure" and "a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement agencies." *Jardines*, 2011 WL 1405080 at *1 & 12. But this Court has repeatedly rejected the idea that an investigation is a search. *Ciraolo*, 476 U.S. at 212 (rejecting an argument that the investigation itself amounted to a search because the flight was not a routine patrol); *Caballes*, 543 U.S. at 408 (rejecting an argument that the shift in purpose from a traffic stop to a drug investigation was a search). An investigation is an investigation, not a search. Being a "sustained and coordinated" effort does not turn an investigation into a Fourth Amendment search. Rather, this Court has "never equated police efficiency with unconstitutionality." *United States v. Knotts*, 460 U.S. 276, 284 (1983).

The Florida Supreme Court's "public spectacle" test considers whether the conduct entails an "untoward level of public opprobrium, humiliation or embarrassment." *Jardines*, 2011 WL 1405080 at *9. The Florida Supreme Court observed that if the resident happens to be home at the time it would be "a frightening and harrowing experience that could prompt a reflexive or unpredictable response." *Jardines*, 2011 WL 1405080 at *12. This new test focuses on the subjective feelings of the suspect rather than the objective intention of the officer. This Court does not even consider the officer's actual state of mind, much less the suspect's, in the determination of whether the Fourth Amendment was violated.

Maryland v. Macon, 472 U.S. 463, 470 (1985) (stating whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind). Whether conduct is a Fourth Amendment search simply cannot be determined based on the suspect's feelings.

The Florida Supreme Court's basic reasoning was that the numerous officers and DEA agents turned this activity into "public spectacle" and therefore, a search. The DEA agents, however, remained in public areas until a search warrant was obtained. This Court has held that there simply is no search when officers are in a public area. *Maryland v. Macon*, 472 U.S. 463, 470 (1985) (explaining that a government agent may enter an open business in the same manner as a private person). All the officers and Franky were in public areas when Franky smelled the marijuana and alerted. The two officers and the dog used the driveway and the walkway to reach the front porch of the house. These are all public areas. 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(f) (4th ed. 2004)(discussing walkways, driveways, and porches as public areas). Moreover, whether a dog sniff is a search should not turn on the number of officers present; whether those officers are state or federal law enforcement officers; or how long they remained in public areas.

The Florida Supreme Court referred to the DEA agents who remained at the residence, while Detective Pedraja went to obtain the search warrant, as evidence of the dog sniff being "an intrusive procedure." *Jardines*, 2011 WL 1405080 at *12 (noting Federal DEA agents, however, remained behind to maintain surveillance of Jardines' home.). This Court, in contrast, has repeatedly held that it is perfectly proper for officers to "freeze" the situation during the time it takes to get a warrant. *Illinois v. McArthur*, 531 U.S. 326 (2001)(holding that officer's refusal to allow defendant to enter his trailer without a police officer until a search warrant was obtained was a reasonable seizure that did not violate the Fourth Amendment); *Segura v. United States*, 468 U.S. 796, 798 (1984)(explaining that officers may secure the premises from within to preserve the status quo while in the process of obtaining a warrant). Here, the search warrant was obtained within approximately one hour and the DEA agents remained outside the house in public area during that time. *Jardines*, 2011 WL 1405080 at *25, n.14 (Polston, J., dissenting). Contrary to the *Jardines* majority's conclusion, the DEA agents remaining outside the house during the time it took to obtain a search warrant did not turn the investigation into a search.

Furthermore, the Florida Supreme Court considered the time involved as part of the calculus to determine that a search occurred but their time calculations were flawed. The Florida Supreme Court observed that the "entire on-the-scene

government activity—*i.e.*, the preparation for the 'sniff test,' the test itself, and the aftermath, which culminated in the full-blown search of Jardines' home—lasted for hours." *Jardines*, 2011 WL 1405080 at *12. Including the time that it actually took to search the house after the officer obtained a warrant was improper. Once a warrant is obtained, the officers are constitutionally entitled to be in the house for however long it takes to conduct a proper search. The Fourth Amendment does not impose a time limit on searches conducted pursuant to a valid warrant. *See Dalia v. United States*, 441 U.S. 238, 257 (1979)(observing that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant . . ." and that "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed. . ."). There is no stop watch involved in warrant searches. The time involved in the actual search of the house after a warrant is obtained is simply not part of the calculus. The dog's sniff took only minutes and it is the only relevant time frame for the issue of whether a dog sniff is a search. The dog handler, Detective Bartlet, testified at the suppression hearing that he and Franky were at the scene for approximately ten minutes. Contrary to the Florida Supreme Court's view of the time involved, the relevant time frame was minutes, not hours.

Finally, the Florida Supreme Court's conclusion that the dog sniff tainted the officer personally smelling the marijuana contradicts this

Court's independent source doctrine. *Murray v. United States*, 487 U.S. 533, 537-39 (1988)(citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)). After Franky left, Detective Pedraja smelled the odor of the live marijuana plants from Jardines' house himself. The Florida Supreme Court reasoned that the human officer smelling of the marijuana "only" confirmed what the dog's sniff had already revealed. *Jardines*, 2011 WL 1405080 at *18. The effect of the Florida Supreme Court's reasoning is that every time a human officer subsequently smells the same odor as the dog, the human officer's smell is always and irretrievably contaminated by the dog's original alert. This is completely contrary to the logic of the independent source doctrine. The human officer's smell was not a product of the dog's sniff. There is no connection at all. They were totally independent events. Indeed, under this Court's caselaw, the human officer's smell was sufficient itself to establish probable cause. *Johnson v. United States*, 333 U.S. 10 (1948) (observing that experienced federal narcotic agents smelling the "distinctive" and "unmistakable" odor of burning opium may be sufficient probable cause to obtain a warrant and characterizing such evidence as likely "to be evidence of most persuasive character."); *United States v. Ventresca*, 380 U.S. 102 (1965)(noting that a "qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists so as to allow issuance of a warrant."). In a myriad of ways, the Florida Supreme Court's new test for what constitutes a search violates this Court's precedent.

III. Significance of the issue

This issue is a significant matter affecting numerous other states and federal law enforcement. The Florida Supreme Court's decision affects numerous nearly a score of other states because the marijuana grown in Florida, a leader in grow house operations, ends up in those other states. The decision adversely affects the Drug Enforcement Agency as well. Much of Florida Supreme Court's reasoning for finding this conduct to be a "spectacle" was the involvement the DEA. The Florida Supreme Court noted, at several points in its analysis, that federal law enforcement was involved. The *Jardines* decision undermines the valuable coordination between federal and state law enforcement because state officers will be wary of involving federal officers on pain of having the mere involvement of those federal officers automatically transform any investigation into a search.

And most importantly, the Florida Supreme Court's decision strips law enforcement of a irreplaceable tool in detecting those who grow marijuana in their living rooms; construct meth labs in their kitchens; hide bodies in their basements; or make bombs in their garages. Dogs can detect all these activities by the simple act of breathing. The *Jardines* decision places unwarranted restrictions on law enforcement's ability to detect such houses by requiring that the officers develop probable cause without employing a dog. It is the dog's alert, however, that often provides the probable cause to

obtain the search warrant of houses that are being used as grow houses, meth labs, or bomb factories. Requiring officers to establish probable cause and obtain a warrant before employing a dog renders the use of any dog superfluous. There is no point in a dog sniff after a warrant is obtained. The purpose of the dog is to develop the probable cause in the first instance. The importance of dogs to law enforcement simply cannot be overstated. This Court should grant the petition and directly hold that a dog sniff of a house is not a Fourth Amendment search thereby restoring this valuable tool in the detection of numerous illegal and dangerous activities to law enforcement.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida

Carolyn M. Snurkowski*
Associate Deputy Attorney General
Carolyn.Snurkowski@myfloridalegal.com

Charmaine M. Millsaps
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300

Counsel for State of Florida
*Counsel of Record

APPENDIX

RECORD AND BRIEFS

11-564

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No. _____

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI BY PETITIONER STATE OF FLORIDA

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA
Carolyn M. Snurkowski*
Associate Deputy Attorney General
carolyn.snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: 850-414-3300
Counsel for State of Florida
**Counsel of Record*

LEGAL LITHO

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Supreme Court of Florida

No. SC08–2101

JOELIS JARDINES,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[April 14, 2011]
REVISED OPINION

PERRY, J.

We have for review *State v. Jardines*, 9 So.3d 1 (Fla. 3d DCA 2008), in which the district court certified conflict with *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. We quash the decision in *Jardines* and approve the result in *Rabb*.

Police conducted a warrantless "sniff test" by a drug detection dog at Jardines' home and discovered live marijuana plants inside. The trial court granted Jardines' motion to suppress the

evidence, and the State appealed. The district court reversed, and Jardines sought review in this Court. Jardines claims that the warrantless "sniff test" violated his right against unreasonable searches under the Fourth Amendment. The issue presented here is twofold: (i) whether a "sniff test" by a drug detection dog conducted at the front door of a private residence is a "search" under the Fourth Amendment and, if so, (ii) whether the evidentiary showing of wrongdoing that the government must make prior to conducting such a search is probable cause or reasonable suspicion.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The United States Supreme Court has held that " '[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Or, more succinctly, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31.

First, the dog "sniff test" that was conducted in the present case was an intrusive procedure. As explained more fully below, the "sniff test" was a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement agencies. On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity—i.e., the preparation for the "sniff test," the test itself, and the aftermath, which culminated in the full-blown search of Jardines' home—lasted for hours. The "sniff test" apparently took place in plain view of the general public. There was no anonymity for the resident.

Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime. Further, if government agents can conduct a dog

"sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. Such an open-ended policy invites over-bearing and harassing conduct. Accordingly, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it must be preceded by an evidentiary showing of wrongdoing.

And second, we note that the parties in the present case have failed to point to a single case in which the United States Supreme Court has indicated that a search for evidence for use in a criminal prosecution, absent special needs beyond the normal need of law enforcement, may be based on anything other than probable cause. We assume that this is because, as explained more fully below, all that Court's precedent in this area indicates just the opposite. And that precedent, we recognize, applies with extra force where the sanctity of the home is concerned. Accordingly, we conclude that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make prior

to conducting a dog "sniff test" at a private residence.

I. BACKGROUND

On November 3, 2006, Detective Pedraja of the Miami-Dade Police Department received an unverified "crime stoppers" tip that the home of Joelis Jardines was being used to grow marijuana. One month later, on December 6, 2006, Detective Pedraja and Detective Bartlet and his drug detection dog, Franky, approached the residence. The underlying facts, which are discussed more fully below, are summarized briefly in the separate opinion of a district court judge in *Jardines*:

> The Miami-Dade County Police Department received a Crime Stoppers tip that marijuana was being grown at the home of defendant-appellee Joelis Jardines. One month later the detective went to the home at 7 a.m. He watched the home for fifteen minutes. There were no vehicles in the driveway, the blinds were closed, and there was no observable activity.
>
> After fifteen minutes, the dog handler arrived with the drug detection dog. The handler placed the dog on a leash and accompanied the dog up to the front door of

the home. The dog alerted to the scent of contraband.

The handler told the detective that the dog had a positive alert for the odor of narcotics. The detective went up to the front door for the first time, and smelled marijuana. The detective also observed that the air conditioning unit had been running constantly for fifteen minutes or so, without ever switching off. [N. 8. According to the detective, in a hydroponics lab for growing marijuana, high intensity light bulbs are used which create heat. This causes the air conditioning unit to run continuously without cycling off.]

The detective prepared an affidavit[1] and applied for a search warrant, which was

---

1. The affidavit that Detective Pedraja submitted to the magistrate provided as follows, in relevant part:

> "Your Affiant's" reasons for the belief that "The Premises" is being used as [a marijuana hydroponics grow lab] and that "The Property [consisting of marijuana and the equipment to grow it]" listed above is being concealed and stored at "The Premises" is as follows:
>
> On November 3, 2006, "Your Affiant" detective William Pedraja, # 1268, received

information from a crime stoppers tip that marijuana was being grown at the described residence.

On December 5, 2006, "Your Affiant" conducted surveillance at the residence and observed no vehicles in the driveway. "Your Affiant" also observed windows with the blinds closed. "Your Affiant" and Detective Doug Bartelt with K-9 drug detection dog "FRANKY" approached "The Premises" in an attempt to obtain a consent to search. While at front door [sic], "Your Affiant" detected the smell of live marijuana plants emanating from the front door of "The Premises." The scent of live marijuana is a unique and distinctive odor unlike any other odor. Additionally, K-9 drug detection dog "FRANKY" did alert to the odor of one of the controlled substances he is trained to detect. "Your Affiant," in an attempt to obtain a written consent to search, knocked on the front door of "The Premises" without response. "Your Affiant" also heard an air conditioning unit on the west side of the residence continuously running without recycling. The combination of these factors is indicative of marijuana cultivation.

Based upon the positive alert by narcotics detector dog "FRANKY" to the odor of one or more of the controlled substances that she is trained to detect and "FRANKY" [sic] substantial training, certification, and past reliability in the field in detecting those controlled substances, it is reasonable to

believe that one or more of those controlled substances are present within the area alerted to by "FRANKY." Narcotics Canine handler, Detective Bartelt, Badge number 4444, has been a police officer with the Miami-Dade Police Department for nine years. He has been assigned to the Narcotics Bureau for six years and has been a canine handler since May 2004. In the period of time he has been with the Department, he has participated in over six hundred controlled substances searches. He has attended the following training and received certification as a canine handler . . . .

Since becoming a team, Detective Bartelt and narcotics detector canine "FRANKY" have received weekly maintenance training . . . . Narcotics detector canine "FRANKY" is trained to detect the odor of narcotics emanating from the following controlled substances to wit: marijuana . . . . To date, narcotics detector canine "FRANKY" has worked approximately 656 narcotics detection tasks in the field. He has positively alerted to the odor of narcotics approximately 399 times. "FRANKY'S" positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana.

issued. A search was conducted, which confirmed that marijuana was being grown inside the home. The defendant was arrested.

The defendant moved to suppress the evidence seized at his home. The trial court conducted an evidentiary hearing at which the detective and the dog handler testified. The trial court suppressed the evidence on authority of *State v. Rabb*.

Jardines, 9 So.3d at 10-11 (Cope, J., concurring in part and dissenting in part) (footnote omitted).

The State appealed the suppression ruling, and the district court reversed based on the following reasoning:

In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in *Rabb*, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not

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WHEREFORE, Affiant prays that a Search Warrant be issued . . . to search "The Premises" above-described . . . .

> have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed. Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with *Rabb*, we certify direct conflict.

Jardines, 9 So.3d at 10 (footnote omitted). Jardines sought review in this Court based on certified conflict with *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006),[2] which we granted.[3]

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2. The Fourth District Court of Appeal in *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006), affirmed the trial court's suppression of illicit drugs (marijuana found growing in Rabb's house) following a warrantless "sniff test" by a drug detection dog at the front door of Rabb's home. The district court based its ruling on *Kyllo v. United States*, 533 U.S. 27 (2001), reasoning as follows:

> [Our logic here] is no different than that expressed in *Kyllo*, one of the recent pronouncements by the United States Supreme Court on law enforcement searches of houses. The use of the dog, like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house, which is reasonably considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no

> importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in *Kyllo*, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the house at all, or in this case, the fact that a dog's sense of smell crossed the "firm line" of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an "intimate detail" of that house, no less so than the ambient temperature inside Kyllo's house. Until the United States Supreme Court indicates otherwise, therefore, we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search.
>
> *Rabb*, 920 So.2d at 1184.

3. We note that the First District Court of Appeal in *Stabler v. State*, 990 So.2d 1258 (Fla. 1st DCA 2008), also certified conflict with *Rabb*. In *Stabler*, the district court held that a dog "sniff test" conducted at an apartment door that opens onto a common area accessible to the general public does not constitute a "search" for Fourth Amendment purposes. As noted herein, *Stabler* is distinguishable from *Rabb* in that *Stabler* involved a "sniff test" conducted at an apartment or other temporary dwelling, not a "sniff test" conducted at a private residence. *See infra* note 10.

II. THE APPLICABLE LAW

The Fourth Amendment to the United States Constitution contains both the Search and Seizure Clause and the Warrant Clause and provides as follows in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[4] With respect to the meaning of the amendment, the courts have come to accept the formulation set forth by Justice Harlan in *Katz*[5]:

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4. The comparable provision of the Florida Constitution is contained in article I, section 12, which further provides: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const.

5. *Katz v. United States*, 389 U.S. 347 (1967) (addressing the issue of whether police, without a warrant, can listen to and record one end of a telephone conversation in a public phone booth via an electronic listening and

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." *My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."* Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Katz, 389 U.S. at 361, 88 S.Ct. 507 (emphasis added) (Harlan, J., concurring); *see California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("*Katz* posits a

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recording device attached to the outside surface of the booth).

two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?"). In sum, "wherever an individual may harbor a 'reasonable expectation of privacy' he is entitled to be free from unreasonable governmental intrusion." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

A. *Federal "Dog Sniff" Cases*

The United States Supreme Court has addressed the issue of "sniff tests" by drug detection dogs in three cases. First, in *United States v. Place*, 462 U.S. 696 (1983), that Court addressed the issue of whether police, based on reasonable suspicion, could temporarily seize a piece of luggage at an airport and then subject the luggage to a "sniff test" by a drug detection dog. After Place's behavior at an airport aroused suspicion, police seized his luggage and subjected it to a "sniff test" by a drug detection dog at another airport and ultimately discovered cocaine inside. The federal district court denied Place's motion to suppress, and the court of appeals reversed. The United States Supreme Court affirmed, concluding that the seizure, which lasted

ninety minutes, was an impermissibly long *Terry*[6] stop, but the Court ruled as follows with respect to the dog "sniff test":

> The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures

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6. *Terry v. Ohio*, 392 U.S. 1 (1968) (addressing the issue of whether police, based on an evidentiary showing of less than probable cause, can temporarily seize and search a person).

> that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

Place, 462 U.S. at 706–07 (quoting *United States v. Chadwick*, 433 U.S. 1, 7 (1977)).

Second, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the United States Supreme Court addressed the issue of whether police could stop a vehicle at a drug interdiction checkpoint and subject the exterior of the vehicle to a "sniff test" by a drug detection dog. Police stopped Edmond and other motorists at a dragnet-style drug interdiction checkpoint, and a drug detection dog was walked around the exterior of each vehicle.

Later, Edmond filed a class action lawsuit against the city, claiming that the checkpoints violated his Fourth Amendment rights, and he sought a preliminary injunction barring the practice. The federal district court denied the injunction, and the court of appeals reversed. The United States Supreme Court affirmed, explaining that "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 41. With respect to the dog "sniff test," the Court stated as follows:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. See *United States v. Place*, 462 U.S. 696 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. See *ibid.* Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." *Ibid.*

Edmond, 531 U.S. at 40 (citation omitted) (quoting *Place*, 462 U.S. at 707).

And third, in *Illinois v. Caballes*, 543 U.S. 405 (2005), the United States Supreme Court addressed the issue of whether police, during the course of a lawful traffic stop, could subject the exterior of a vehicle to a "sniff test" by a drug detection dog. After Caballes was stopped for speeding and while the officer was writing the citation, a second officer arrived at the scene and subjected the exterior of the vehicle to a dog "sniff test." The dog alerted at the trunk and the officers searched the trunk and found marijuana. The state trial court denied Caballes' motion to suppress, and the Illinois Supreme Court reversed. The United States Supreme Court reversed, ruling as follows:

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. *Jacobsen*, 466 U.S., at 123. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the

same as an interest in "privacy that society is prepared to consider reasonable." *Id.*, at 122 (punctuation omitted). In *United States v. Place*, 462 U.S. 696 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "*sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item." *Id.*, at 707; see also *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000). Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.

Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707–during a lawful

> traffic stop generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Caballes, 543 U.S. at 408–09 (citation omitted).

Further, the Court in *Caballes* distinguished its ruling in *Kyllo v. United States*, 533 U.S. 27 (2001), as follows:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband

> in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

B. *Two Additional Federal Cases*

In two additional cases, the United States Supreme Court has addressed Fourth Amendment issues that are relevant here. First, in *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court addressed the issue of whether police, without a showing of probable cause, could temporarily seize and inspect a small portion of the contents of a package, which had been damaged in transit and was being held by a private shipping company, and then subject the contents to a field test for cocaine. After employees of a private freight carrier discovered a suspicious white powder in a damaged package and notified federal agents, the agents conducted a field chemical test on the powder and determined that it was cocaine. The federal district court denied Jacobsen's motion to suppress, and the court of appeals reversed. The United States Supreme Court reversed, reasoning as follows:

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.

This conclusion is dictated by *United States v. Place*, 462 U.S. 696 (1983), in which the Court held that subjecting luggage to a "sniff test" by a trained narcotics detection dog was not a "search" within the meaning of the Fourth Amendment . . . .

> Here, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.

Jacobsen, 466 U.S. at 123–24 (footnote omitted).

And second, in *Kyllo v. United States*, 533 U.S. 27 (2001), the United States Supreme Court addressed the issue of whether police, without a warrant, could use a thermal-imaging device to scan a private home to determine if the amount of heat generated by the home was consistent with the use of high-intensity lamps used in growing marijuana. After federal agents became suspicious that Kyllo was growing marijuana in his home, agents scanned the outside of the triplex with a thermal-imaging device, which showed that the garage roof and side of the residence were inordinately warm. The agents obtained a warrant and searched the residence and found live marijuana plants inside. The federal district court denied Kyllo's motion to suppress, and the circuit court affirmed. The United States Supreme Court reversed, reasoning as follows:

> The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has

often been criticized as circular, and hence subjective and unpredictable. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area" constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

We have said that the Fourth Amendment draws "a firm line at the entrance to the house." That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

> "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925).

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a

"search" and is presumptively unreasonable without a warrant.

Kyllo, 533 U.S. at 34-40 (citations omitted) (quoting *Silverman*, 365 U.S. at 512; *Payton v. New York*, 445 U.S. 573, 590 (1980)).

III. ANALYSIS

As noted above, the issue raised in the present case is twofold: (i) whether a "sniff test" by a drug detection dog conducted at the front door of a private residence is a "search" under the Fourth Amendment and, if so, (ii) whether the evidentiary showing of wrongdoing that the government must make prior to conducting such a search is probable cause or reasonable suspicion.

A. *The Federal "Dog Sniff" Cases Are Inapplicable to the Home*

For reasons explained below, we conclude that the analysis used in the above federal "dog sniff" cases is inapplicable to a "sniff test" conducted at a private home. First, we recognize that the United States Supreme Court has ruled that because a "sniff test" conducted by a drug detection dog is "sui generis," or unique, in the sense that it is minimally intrusive and is designed to detect only illicit drugs and nothing more, *Place*, 462 U.S. at 707, a dog "sniff test" does not

implicate Fourth Amendment rights when employed in the following settings: (i) when conducted on luggage that has been seized at an airport based on reasonable suspicion of unlawful activity, where the luggage has been separated from its owner and the "sniff test" is conducted in a public place, *see Place*, 462 U.S. 696; (ii) when conducted on the exterior of a vehicle that has been stopped in a dragnet-style stop at a drug interdiction checkpoint, *see Edmond*, 531 U.S. 32; and (iii) when conducted on the exterior of a vehicle that has been subjected to a lawful traffic stop. *See Caballes*, 543 U.S. 405. Further, the United States Supreme Court has applied a similar analysis to a chemical "field test" for drugs when conducted on the contents of a package that has been damaged in transit and is being held by a private shipping company. *See Jacobsen*, 466 U.S. 109.

We note, however, that in each of the above cases, the United States Supreme Court was careful to tie its ruling to the particular facts of the case. *See Place*, 462 U.S. at 707 ("[W]e conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."); *Edmond*, 531 U.S. at 40 ("The fact that officers walk a narcotics-detection

dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search."); *Caballes*, 543 U.S. at 409 ("In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."); *Jacobsen*, 466 U.S. at 123 ("It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised."). Nothing in the above cases indicates that the same analysis would apply to a dog "sniff test" conducted at a private residence.

Significantly, all the sniff and field tests in the above cases were conducted in a minimally intrusive manner upon objects—luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen*—that warrant no special protection under the Fourth Amendment. All the tests were conducted in an impersonal manner that subjected the defendants to no untoward level of public opprobrium, humiliation or embarrassment. There was no public link between the defendants and the luggage as it was being tested in *Place* or the package as it was being tested in *Jacobsen*, and

the defendants retained a degree of anonymity during the roadside testing of their vehicles in *Edmond* and *Caballes*. Further, and more important, under the particular circumstances of each of the above cases, the tests were not susceptible to being employed in a discriminatory or arbitrary manner—the luggage in *Place* had been seized based on reasonable suspicion; the vehicle in *Edmond* had been seized in a dragnet-style stop; the vehicle in *Caballes* had been seized pursuant to a lawful traffic stop; and the contents of the package in *Jacobsen* had been seized after the package had been damaged in transit by a private carrier. All these objects were seized and tested in an objective and nondiscriminatory manner, and there was no evidence of overbearing or harassing government conduct. There was no need for Fourth Amendment protection. As explained below, however, such is not the case with respect to a dog "sniff test" conducted at a private residence.

B. *"Sniff Test" at a Private Home*

As noted above, the United States Supreme Court has held that "wherever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable government intrusion." *Terry*, 392 U.S. at 9 (quoting *Katz*, 389 U.S. at 351 (Harlan, J., concurring)). Nowhere is this right more resolute than in the private home: "

'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Kyllo*, 533 U.S. at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The sanctity of the citizen's home is a basic tenet of Anglo-American jurisprudence:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.). In his Commentaries on the Laws of England, William Blackstone noted that
>
> > "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome . . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 Commentaries 223 (1765-1769).

> The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home . . . .

Wilson v. Layne, 526 U.S. 603, 609-10 (1999); *see also United States v. United States Dist. Court for Eastern Dist. of Mich.*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . .").

Although police generally may initiate a "knock and talk" encounter at the front door of a private residence without any prior showing of wrongdoing, *see State v. Morsman*, 394 So.2d 408, 409 (Fla. 1981) ("Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time."), a dog "sniff test" is a qualitatively different matter. Contrary to popular belief, a "sniff test" conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle "sniff test" and signals an "alert" if drugs are detected. Quite the contrary. In the present case, for instance, on the morning of December 5, 2006, members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, conducted a surveillance of Jardines' home. As Detectives

Pedraja and Bartlet and the drug detection dog, Franky, approached the residence, Sergeant Ramirez and Detective Donnelly of the Miami-Dade Police Department established perimeter positions around the residence and federal DEA agents assumed stand-by positions as backup units.

The "sniff test" conducted by the dog handler and his dog was a vigorous and intensive procedure. Detective Bartlet testified as follows on direct examination at the suppression hearing:

> Q. After you stepped onto the property, what did you do?
>
> A. I, basically, approached with my canine partner. The way my canine partner works, he is very strongly driven, so he is actually out in front of me. He is one of the dogs that will actually pull me around very dramatically.
>
> So he pulled directly up the porch as he is trained to do, and immediately upon crossing the threshold of the archway which you see here, upon entering the alcove of the porch, he began tracking an airborne odor.
>
> Q. Let me stop you there, Officer.

A. Sure.

Q. At this time in time, how far into this home did you get or into the entranceway of the home did you get? I want you to point to the Court.

A. You see there's a walker there? That's about the area that it was I was in.

Q. There is also an archway there. Did you ever cross in through that archway?

A. Not that I recall, no.

Q. So, where exactly was your dog when he alerted to an alert of contraband?

A. The alert for the dog, basically, is the minute I observed out of normal behavior for him.

In this particular case, the abnormal behavior would have been the head high, tracking the airborne odor. He began tracking that airborne odor by bracketing and tracking back and forth.

Q. What exactly is bracketing?

A. Bracketing is a technique that the dog uses once he comes to an odor—which is basically you can think of it as a cloud of odor.

Once he gets into that cloud of odor, he is trained to go to the strongest point. We call that source.

So, he is bracketing back and forth, back and forth, within the cone of odor to determine the strongest source. In this particular residence source for him was the base of the door.

Q. And is Detective Pedraja observing this as well? You can't speak for him?

A. Yeah, I—to be honest with you, all I'm doing is concentrating on the dog, watching the dog's head movements, his body postures, whence he is indicating towards me.

Q. Detective, your dog is on a leash at that point?

A. Oh, absolutely.

Q. How long is that leash?

A. It's approximately six feet. And then you have the length of my arm, so you can assume from there.

Q. Okay. Once the dog began—what is it the dog did that told you he had an alert?

A. Okay. He immediately told me he had an alert when he began tracking that odor. Now I know he is in odor and he needs to find source.

So, what I do is I get back as far as I can. I let him have the full six feet of the leash plus whatever safe distance I can give him without running off in order for him to determine where source is.

For example, if I don't do that, source could be the motorcycle, it could be somewhere else other than the front door.

So, in order for me to fully observe his alert and where the source is, I need to be creating as much distance as I can.

Often handlers will drop the leash and walk away completely. I don't do that with him because he is a little bit wild, so I maintain control of the leash and observe

him from a distance so that I can indicate where source is going to be.

Q. Okay. So, once he detects a source and he is bracketing and he is doing this behavior, what is the next thing that you observe this dog do?

A. The final culmination of his abnormal behavior is a sitting position, and he did that immediately following the sniff at the base of the door, which indicates source to me.

Q. And once Franky, your dog, did that, what did you then do?

A. I then pulled him off of the sit and returned to my vehicle.

Q. Did you at any point in time communicate what the dog did to anybody?

A. Yeah, I indicated to the lead detective that there was a positive alert for the odor of narcotics.

Q. And where exactly, in what direction around you, was the detective at that point?

A. He would have been behind me, so I passed him up in the driveway.

Q. Once you pulled the dog away from the door, where did you then go?

A. To my vehicle.

With respect to the location of Detective Pedraja in relation to Detective Bartlet and Franky during the "sniff test," Bartlet testified as follows on redirect examination at the suppression hearing:

Q. Would Detective Pedraja be in front of you as you are conducting canine—I don't even know what you would call it.

. . . .

[A.] Would he be in front of—while Franky is sniffing the door? Definitely not.

Q. Why not?

A. Because he would be obstructing his ability to perform. He would be blocking him. He would be—if he was standing in front of the door, Franky may not be able to get to source. So he needs to be out of the way.

Q. Was Detective Pedraja standing next to you?

A. No.

Q. Why not?

A. Because he probably would get knocked over by Franky when Franky is spinning around trying to find source.

[THE PROSECUTOR]: No further questions.

After the "sniff test" was completed, Detective Bartlet and Franky left the scene to assist in another case. Detective Pedraja, after waiting at the residence for fifteen or twenty minutes, also left the scene to prepare a search warrant and to submit it to a magistrate. Federal DEA agents, however, remained behind to maintain surveillance of Jardines' home. Pedraja obtained a search warrant later that day and returned to the scene. About an hour later, members of the Miami-Dade Police Department, Narcotics Bureau, and DEA agents executed the warrant by gaining entry to Jardines' home through the front door. As agents entered the front door, Jardines exited through a sliding glass door at the rear of the house. He was apprehended by

Special Agent Wilson of the DEA and was turned over to the Miami-Dade Police Department. He was charged with trafficking in marijuana and theft of electricity.

Based on the foregoing, we conclude that the dog "sniff test" that was conducted here was an intrusive procedure. The "sniff test" was a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments. On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity—i.e., the preparation for the "sniff test," the test itself, and the aftermath, which culminated in the full-blown search of Jardines' home—lasted for hours. The "sniff test" apparently took place in plain view of the general public. There was no anonymity for the resident.

Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and

embarrassment for the resident, whether or not he or she is present at the time of the search, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime. *Cf. Place*, 462 U.S. at 707 (explaining that the dog "sniff test" in that case was not a "search" within the meaning of the Fourth Amendment because it was limited in scope and was anonymous and did not subject the individual to "embarrassment and inconvenience"). And if the resident happens to be present at the time of the "sniff test," such an intrusion into the sanctity of his or her home will generally be a frightening and harrowing experience that could prompt a reflexive or unpredictable response.

Further, all the underlying circumstances that were present in the above federal "dog sniff" and "field test" cases that guaranteed objective, uniform application of those tests—i.e., the temporary seizure of luggage based on reasonable suspicion of criminal activity in *Place*; the temporary seizure of a vehicle in a dragnet-style stop at a drug interdiction checkpoint in *Edmond*; the temporary seizure of a vehicle based on a lawful traffic stop in *Caballes*; and the temporary seizure of a portion of the contents of a package that had been damaged in transit in *Jacobsen*—are absent from a warrantless "sniff test" conducted at a private residence. Unlike the objects in those

cases, a private residence is not susceptible to being seized beforehand based on objective criteria. Thus, if government agents can conduct a dog "sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. *Cf. Camara v. Mun. Court of City & Cnty. of S. F.*, 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). Such an open-ended policy invites overbearing and harassing conduct.[7]

In sum, a "sniff test" by a drug detection dog conducted at a private residence does not *only* reveal the presence of contraband, as was the case

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7. There is little doubt, however, that a dragnet-style sweep of an entire residential neighborhood or of a multi-unit residential dwelling, conducted without any individualized suspicion of wrongdoing, would be impermissible. *Cf. City of Indianapolis v. Edmond*, 531 U.S. at 41 ("We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion.").

in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment—specifically, the search must be preceded by an evidentiary showing of wrongdoing. We note that the rulings of other state[8] and federal[9] courts with respect to a

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8. *Compare State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006) (holding that a dog "sniff test" outside a private residence is a "search" within the meaning of the Fourth Amendment); *with People v. Jones*, 755 N.W.2d 224 (2008) (holding that a dog "sniff test" outside a private residence is not a "search" within the meaning of the Fourth Amendment); *and Porter v. State*, 93 S.W.3d 342 (Tex.App.2002) (holding that a dog "sniff test" outside a private residence is not a "search" within the meaning of the Fourth Amendment); *and Rodriguez v. State*, 106 S.W.3d 224 (Tex.App.2003) (holding that a dog "sniff test" outside a private residence is not a "search" within the meaning of the Fourth Amendment).

9. *See United States v. Tarazon-Silva*, 960 F.Supp. 1152 (W.D.Tex.1997) (holding that a dog "sniff test" outside

dog "sniff test" conducted at a private residence are generally mixed, as are the rulings of other state[10] and federal[11] courts with respect a dog "sniff test"

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a private residence is not a "search" within the meaning of the Fourth Amendment).

10. *Compare State v. Ortiz*, 600 N.W.2d 805 (1999) (holding that a dog "sniff test" outside an apartment is a "search" within the meaning of the Fourth Amendment); *with Fitzgerald v. State*, 864 A.2d 1006 (2004) (holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment); *and Stabler v. State*, 990 So.2d 1258 (Fla. 1st DCA 2008) (holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment); *and Nelson v. State*, 867 So.2d 534 (Fla. 5th DCA 2004) (indicating that a dog "sniff test" outside a hotel room is not a "search" within the meaning of the Fourth Amendment); *and People v. Dunn*, 564 N.E.2d 1054 (1990) (holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment, but is a search within the meaning of the state constitution).

11. *Compare United States v. Whitehead*, 849 F.2d 849 (4th Cir.1988) (holding that a dog "sniff test" outside a railway sleeper compartment is a "search" within the meaning of the Fourth Amendment); *and United States v. Thomas*, 757 F.2d 1359 (2d Cir.1985) (holding that a dog "sniff test" outside an apartment is a "search" within the meaning of the Fourth Amendment); *with United States v. Brock*, 417 F.3d 692 (7th Cir.2005) (holding that a dog "sniff test" outside a locked bedroom is not a "search" within the meaning of the Fourth Amendment); *and United States v. Roby*, 122 F.3d 1120 (8th Cir.1997) (indicating that a dog "sniff test" outside a hotel room is not a "search" within the

conducted at an apartment or other temporary dwelling.

C. *The Requirement of Probable Cause*

As noted above, the Warrant Clause of the Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The United States Supreme Court has noted the key protective role that this clause plays with respect to private property:

> Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court.

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meaning of the Fourth Amendment); *and United States v. Colyer*, 878 F.2d 469 (D.C.Cir.1989) (holding that a dog "sniff test" outside a railway sleeper compartment is not a "search" within the meaning of the Fourth Amendment); *and United States v. Broadway*, 580 F.Supp.2d at 1179 (D.Colo.2008) (holding that a dog "sniff test" outside an apartment is not a "search" within the meaning of the Fourth Amendment).

> Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.

Camara, 387 U.S. at 528-29. Specifically, with respect to the home, that Court has noted as follows:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson v. United States, 333 U.S. 10, 14 (1948); *see also Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) ("[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or

arrest."). Or, more succinctly: "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31; *see also Payton v. New York*, 445 U.S. 573, 586 (1980) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.") (internal quotation marks omitted).

The Court of Appeals for the District of Columbia in *United States v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989), was confronted with the following question: if a dog "sniff test" is a "search" under the Fourth Amendment and must be preceded by an evidentiary showing of wrongdoing, must that showing be probable cause, or reasonable suspicion? That court addressed the question at length:

> In his concurring opinion in *Place*, Justice Blackmun suggested that "a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon a mere reasonable suspicion." 462 U.S. at 723 (Blackmun, J., concurring in judgment). We find ourselves hard pressed for authority from the Supreme Court to support Justice Blackmun's underlying premise—that there is a category

of "minimally intrusive" searches that are supportable under *Terry* on less than probable cause.

It is certainly true that the Supreme Court has upheld a wide variety of searches on less than probable cause as traditionally understood, but in no case was a law-enforcement search denominated "minimally intrusive." Indeed, the Supreme Court's opinion in *Arizona v. Hicks*, may indicate that the contrary is the case, *i.e.*, that the Fourth Amendment knows no search but a "full-blown search." *Hicks*, 480 U.S. at 328 ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). *Compare id. with id.* at 333 (O'Connor, J., dissenting) ("distin[guishing] between searches based on their relative intrusiveness . . . is entirely consistent with our Fourth Amendment jurisprudence").

Rather than interpreting *Terry* as broad authority for the proposition that minimally intrusive searches may be justified on the basis of reasonable suspicion, the Supreme Court has on several occasions limited *Terry* to its precise underpinnings, *i.e.*, protective searches for weapons. *See Dunaway v. New York*, 442 U.S. 200, 210 (1979) (*Terry* is directed to "limited, on-the-

street frisk[s] for weapons."). Indeed, the Court has gone so far as to say that *Terry* provides no support for "any search whatever for anything but weapons." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979). *See also Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam); *Sibron v. New York*, 392 U.S. 40, 64-65 (1968) ("The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception--the protection of the officer by disarming a potentially dangerous man."). Thus, Professor LaFave seems correct in concluding that "there is no search-for-evidence counterpart to the Terry weapons search, permissible on only a reasonable suspicion that such evidence would be found." [3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.4(g), at 539 (2d ed. 1987)].

However, *Terry* does represent one of a lengthy line of cases in which the Supreme Court has upheld a search or seizure "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985). Yet a

careful reading of the Supreme Court's teachings leaves us doubtful that "reasonableness balancing" is appropriate in the context of the present case. Five times in as many years the Court has indicated that balancing is only appropriate when warranted by "special needs, beyond the normal need for law enforcement." *See Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Griffin v. Wisconsin*, 483 U.S. 868, (1987); *O'Connor v. Ortega*, [480 U.S. 709 (1987)]; *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment).

This interpretation explains the various cases in which the Supreme Court has held searches to be lawful despite the absence of probable cause as traditionally understood. *See T.L.O.*, 469 U.S. 325 (search by school official of student's purse); *O'Connor*, 480 U.S. 709 (work-related search by governmental employer); *Griffin*, 483 U.S. 873-74 (search of probationer's home); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (housing inspections); *New York v. Burger*, [482 U.S. 691 (1987)] (inspections of highly regulated business premises); *Donovan v. Dewey*, 452 U.S. 594 (1981) (inspections of underground mines); *Bell v.*

Wolfish, 441 U.S. 520, 558-60 (1979) (body cavity searches of prison inmates); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81 (1975) (border patrols); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (inspections of "pervasively regulated business" for compliance with Gun Control Act); *Terry*, 392 U.S. 1 (search for weapons, to protect officer and public). In no case has the Supreme Court indicated that a search for evidence *qua* evidence might qualify as a "special need" that would warrant reasonableness balancing. Common sense suggests that it is not.

To be sure, the Supreme Court has upheld on reasonable suspicion a variety of "minimally intrusive" *seizures* in contexts different from the "stop and frisk" originally approved in *Terry*. In such cases, the "'seizures' [were] so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway v. New York*, 442 U.S. at 210. *See, e.g., United States v. Sharpe*, 470 U.S. 675, 685 (1985) (investigative stop of vehicle); *Delaware v. Prouse*, 440 U.S. 648 (1979) (random checks for drivers' licenses and vehicle registration); *United States v. Brignoni-Ponce*, 422 U.S. at

880-81 (brief investigative stop of motorists near border for questioning; analogizing situation to encounter addressed in *Terry*); *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 592 (1983) (random seizure of vessel in order to examine manifest); *United States v. Martinez-Fuerte*, 428 U.S. [543, 560 (1976)] (brief random checkpoint questioning for aliens). Although there may be no compelling reason to differentiate between seizures on the basis of their intrusiveness and failing to likewise differentiate between types of searches, the fact remains that we are unable to point to a single Supreme Court case that has upheld a search on reasonable suspicion merely because it was minimally intrusive. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam); *Adams v. Williams*, 407 U.S. 143 (1972); *cf. Martinez-Fuerte*, 428 U.S. at 561 (upholding as reasonable a random seizure and noting that it was not dealing with a search).

Colyer, 878 F.2d at 477-79 (citations omitted).

Professor LaFave has reached the same conclusion with respect to the issue of probable cause versus reasonable suspicion:

Assuming now that *some* uses of these dogs constitutes a search, it does not inevitably follow that they should be encumbered by the restrictions ordinarily applicable to other types of searches which are clearly more intrusive in character. While it has sometimes been asserted that if the use of trained dogs is a search then such surveillance is unconstitutional if conducted in absence of a warrant supported by probable cause, it may be argued that the Fourth Amendment does not demand such a result. In *Terry v. Ohio*, the Court upheld a limited warrantless search made upon less than full probable cause "by balancing the need to search . . . against the invasion which the search . . . entails," and thus a similar approach might be taken as to the kind of search here under discussion. Although there are sound reasons for not employing too generously a graduated model of the fourth amendment, the notion that searches by use of dogs trained to detect narcotics . . . is a lesser intrusion subject to lesser Fourth Amendment restrictions is an appealing one. This is because this particular investigative technique is a distinct police practice which quite obviously is much less intrusive than other searches. It seems rather unlikely, however, that the Supreme Court would now reach such a

> conclusion. The Court has declared that the Fourth Amendment knows no search but a "full-blown search," asserted that *Terry* provides no support for "any search whatever for anything but weapons," and cautioned that the balancing process is appropriate only when warranted by "special needs beyond the normal need of law enforcement."

1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.2(g), at 540-41 (4th ed. 2004) (quotation marks and footnotes omitted).

We agree with the above analyses and note that the parties in the present case have failed to point to a single case in which the United States Supreme Court has indicated that a search for evidence for use in a criminal prosecution, absent special needs beyond the normal need of law enforcement, may be based on anything other than probable cause. We assume that this is because, as noted in the commentary above, all that Court's precedent in this area indicates just the opposite. And that precedent, we recognize, applies with extra force where the sanctity of the home is concerned. Accordingly, we conclude that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make under the Fourth

Amendment prior to conducting a dog "sniff test" at a private residence.

IV. THE SUPPRESSION RULING

A magistrate's determination that probable cause exists for issuance of a search warrant is entitled to great deference when a trial court is considering a motion to suppress. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) ("[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that' probable cause existed."). And a trial court's ruling on a motion to suppress in such a case is subject to the following standard of review: the reviewing court must defer to the trial court's factual findings if supported by competent, substantial evidence but must review the trial court's ultimate ruling independently, or de novo. *State v. Glatzmayer*, 789 So.2d 297, 301 n. 7 (Fla.2001); *see also Connor v. State*, 803 So.2d 598 (Fla.2001).

In the present case, the trial court granted Jardines' motion to suppress, ruling as follows:

> This cause having come before this Court on Defendant, Joelis Alex Jardines', motion to suppress evidence seized from his house and this Court having reviewed the motion, the arguments of counsel, the court

file and the records in this case, and being otherwise fully advised in the premises therein:

A drug detector dog was used to support probable cause for the issuance of a search warrant of the Defendant's house. The Defendant moved to suppress the evidence of drugs recovered from his house as a result of the search warrant. Pursuant to *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006), this Court concludes that law enforcement's use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search.

However, the Court must also consider, absent the dog sniff information, whether any independent and lawfully obtained evidence establishes a substantial basis for concluding that probable cause existed to support the issuance of a search warrant for the Defendant's house.

The probable cause affidavit listed the information provided from a crime stoppers tip that marijuana was being grown at the residence as a basis to support probable cause for the issuance of a search warrant. However, the crime stoppers tip was unverified and came from an unknown

individual rather than a qualified confidential informant. Additionally, there was no evidence to suggest the crime stoppers tip was corroborated by any evidence resulting from surveillance of the house. The only other evidence contained in the affidavit was that the window blinds were closed and the air conditioner unit was constantly running without recycling. This information, considered in its totality, simply does not suggest a fair probability of any broader criminal activity, such as the growing of marijuana in the Defendant's house. Therefore, this Court concludes that no independent and lawfully obtained evidence establishes the probable cause necessary to support the issuance of a search warrant for the Defendant's house.

Ordered and adjudged that even with great deference afforded to the search warrant for the Defendant's house in this case, the probable cause affidavit did not provide a substantial basis for concluding that probable cause existed. Therefore, the motion to suppress evidence seized from the Defendant's house is granted.

With respect to the fact that Detective Pedraja testified that he smelled the odor of live marijuana plants as he stood outside the front door of

Jardines' house, the trial court stated as follows in a footnote: "There was evidence that after the drug detection dog had alerted to the odor of a controlled substance, the officer also detected a smell of marijuana plants emanating from the front door. However, this information was only confirming what the detection dog had already revealed."

As explained above, a warrantless "sniff test" by a drug detection dog conducted at the front door of a private residence is impermissible under the Fourth Amendment. Thus, the trial court properly excluded the results of the "sniff test" from its review of the magistrate's probable cause determination. The remaining evidence consisted of the following: the unverified "crime stoppers" tip, the closed window blinds, and the constantly running air conditioner. As for Detective Pedraja's statement that he detected the odor of live marijuana plants as he stood outside the front door, we note that the trial court had the opportunity to observe Detective Pedraja's testimony first-hand at the suppression hearing. Further, the district court in Rabb addressed an identical situation and concluded as follows:

> [B]ecause the chronology of the probable cause affidavit suggests that the dog alert to marijuana occurred prior to law enforcement's detection of its odor, we

> cannot assume that law enforcement detected the odor of marijuana before the dog alerted . . . . As such, this is not a case in which a law enforcement officer used his senses to detect something within his plain smell; rather, a law enforcement officer used enhanced, animal senses to detect something inside a home that he might not otherwise have detected.

Rabb, 920 So.2d at 1191. Based on our review of the present record, we conclude that the trial court's factual findings are supported by competent, substantial evidence and the trial court's ultimate ruling is supported in the law. The district court erred in reversing the suppression ruling.

V. CONCLUSION

"We have said that the Fourth Amendment draws 'a firm line at the entrance to the house.' That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant." *Kyllo*, 533 U.S. at 40 (citation omitted) (quoting *Payton*, 445 U.S. at 590). Given the special status accorded a citizen's home in Anglo-American jurisprudence, we hold that the warrantless "sniff test" that was conducted at the front door of the residence in the present case was an unreasonable

government intrusion into the sanctity of the home and violated the Fourth Amendment.

We quash the decision in *Jardines* and approve the result in *Rabb*.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and LABARGA, JJ., concur.

LEWIS, J., specially concurs with an opinion, in which PARIENTE and LABARGA, JJ., concur.

POLSTON, J., dissents with an opinion, in which CANADY, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

LEWIS, J., specially concurring.

The importance of freedom and liberty upon which this nation was founded is expressed in the Fourth Amendment and its protection of our homes from the government. This precious amendment reflects who we are as a people and reflects our values that protect every citizen from unreasonable intrusions by the government. " 'At the very core' of the Fourth Amendment 'stands

the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' " *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "Of all the places that can be searched by the police, one's home is the most sacrosanct, and receives the greatest Fourth Amendment protection." *United States v. McGough*, 412 F.3d 1232, 1236 (11th Cir. 2005) (citing *Payton v. New York*, 445 U.S. 573, 585 (1980)). In light of the elevated protections afforded to the privacy of one's home, the United States Supreme Court has held that "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31 (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). This Court has also expressed its reluctance to intrude on the privacy of one's home:

> The Fourth Amendment establishes "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV (emphasis added). Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *United States v. United States District Court*, 407 U.S. 297, 313 (1972), and "[a]t the very core [of the Fourth Amendment] stands the right

> of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

State v. Titus, 707 So.2d 706, 708 (Fla.1998). In my view the primary emphasis in this case must fall on this concept of "home" and its sacred place under Fourth Amendment law.

First, the underlying basis for the search in question here, i.e., the anonymous tip, was insufficient to justify a search that would otherwise be in violation of the Fourth Amendment. In *J.L. v. State*, 727 So.2d 204 (Fla.1998), aff'd, 529 U.S. 266 (2000), this Court held that an anonymous tip cannot be a stand alone basis for reasonable suspicion. This Court made clear that when presented with an anonymous tip, "police must observe *additional* suspicious circumstances as a result of . . . independent investigation" before the police can act on that tip. *Id.* at 207 (citing *Alabama v. White*, 496 U.S. 325, 329 (1990)). In unanimously upholding this Court's decision in *J.L.*, the United States Supreme Court also held that an uncorroborated anonymous tip is not a reliable justification for a Fourth Amendment search because, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be

fabricated . . . 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.' " *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 146-47 (1972)) (quoting *White*, 496 U.S. at 329.

Here, the "sniff test" was conducted based on nothing more than an unverifiable anonymous tip. *See State v. Jardines*, 9 So.3d 1, 2 (Fla. 3rd DCA 2008). Prior to entering the private porch of Jardines, the only purported "additional suspicious circumstance" referenced by the investigating officer was that he observed the air conditioning unit running continuously for fifteen minutes without interruption. *See id.* If a continuously running air conditioner is indicative of marijuana cultivation, then most Florida citizens and certainly all of my neighbors would be suspected drug dealers subject to intrusive searches by law enforcement. The elevation of such a ridiculous observation in the heat of Florida cannot serve as a basis for intrusion on the heightened expectation of privacy that one enjoys in one's home. Further, there was no evidence of any impending emergency or concern with regard to destruction of evidence. In light of the complete lack of any legitimate, articulable grounds for searching Jardines' home, the police officer, and his accompanying dog, should not have been on Jardines' porch "sniffing" under the front door in the first place.

Second, it is my view that the dog action here constituted a search of a home, in and of itself, and falls within the concept of a search under the Fourth Amendment. A reasonable expectation of privacy, a value of this society that has developed over many decades, applies not only to the physical, tangible items within a home, but also to the air and odors that may be within and may unintentionally escape from within. The scent of items cooking on a stove, the whiff of an air freshener, or even the foul smell associated with a ruptured sewage line are all intimate details of a home that are expected to remain private and unavailable to the public. We as Americans have an unwavering expectation that there will not be someone, or something, sniffing into every crack, crevice, window, or chimney of our homes. We especially do not expect strangers to bring dogs onto or into our private front porches to sniff under our front doors or any of the cracks or crevices of our homes. This protected interest of the expectation of privacy will be obliterated if a single individual, manipulating an animal, is permitted to make the final determination as to whether the government should enter into a private residence based upon an unverified, uncorroborated, anonymous tip. To sanction and approve turning the "dogs loose" on the homes of Florida citizens is the antithesis of freedom of private property and the expectation of privacy as we have known it and contrary to who we are as a free people.

The private residence is completely unlike the operation of a motor vehicle on highways, the transport of suitcases in public places, or the transport of packages in public transport. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *United States v. Place*, 462 U.S. 696 (1983). The sanctity of the private residence, above all other expectations of privacy, has been a hallmark of this nation. A private residence is the most sacred of places under the Fourth Amendment, and an intrusion into that sacrosanct privacy commands the highest level of judicial scrutiny. As articulated by the Fourth District Court of Appeal, "An airport and a highway are unquestionably public places with little or no privacy, as much as a home is undoubtedly a private place characterized by its very privacy." *State v. Rabb*, 920 So.2d 1175, 1186 (Fla. 4th DCA 2006). Further, luggage located in a public airport, the interior of a vehicle driving on a public highway, and the contents of a package in public transport are "quite different from a house, not only in physical attributes, but also in the historical protection granted by law." Id. at 1184. A private home, on the other hand, is just that, a private, individual home.

While the expectation of privacy inherent within the private residence may not exist in or extend to common walkways, roadways, or other locations that are not within a private dwelling,

that which is within the private residence is most assuredly protected. A hallway outside a college dormitory, for example, may not contain the same expectation of privacy as the front door and living room of a private home. We may discuss and debate the concept and extent of curtilage and the nexus with a private residence necessary to be considered part of a protected area. However, it is inescapable that the air and the content of the air within the private home is inextricably interwoven as part of the protected zone of privacy to which the expectation of privacy attaches. This air is inextricably interwoven in the constitutional context as part of the sanctity of a Florida private home and the private lives of our citizens protected therein. The home and the air within the home are expected and intended to remain within the sanctity of the home with no intent, design, or expectation that they become public or exposed beyond the walls of the home. While one of great wealth with a newly constructed air-tight private home surely has an expectation of privacy of the home and of the air constituted therein, his less wealthy Florida neighbor should not be denied the same fundamental protection simply because his less substantially constructed private home may have a crack or crevice through which air or odors may unintentionally and unexpectedly escape to its curtilage. Allowing a dog to sniff the air and odors that escape from within a home under a door is tantamount to physical entry into that home.

Under the view articulated by the dissent, a dog entering a home through the front door, a window, or any other large crack or crevice would not amount to an unconstitutional search. Surely we cannot permit the sanctity of the privacy of our homes to be measured by the size of the cracks or crevices from which air may escape.

My esteemed colleague in dissent incorrectly asserts that a recognition of the right of Floridians to be free from unauthorized dog sniffs *in their homes* is a violation of United States Supreme Court precedent. Specifically, my colleague relies on four inapplicable United States Supreme Court decisions that approve the validity of dog sniffs in *limited* situations *outside the home*, each of which is so clearly distinguishable from the facts presently before the Court. In *United States v. Place*, 462 U.S. 696, 697-98 (1983), the narrow question before the United States Supreme Court was whether the Fourth Amendment prohibits law enforcement authorities from *temporarily detaining personal luggage outside the home in a public place* for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics. In *United States v. Jacobsen*, 466 U.S. 109, 111 (1984), the Supreme Court simply determined whether police needed to obtain a warrant before searching a damaged package in a public location, visibly leaking a white powdery substance, while *in the*

possession of a private freight carrier. In *City of Indianapolis v. Edmond*, 531 U.S. 32, 34, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), the United Supreme Court considered in a public place the "*constitutionality of a highway checkpoint program* whose primary purpose is the discovery and interdiction of illegal narcotics." (Emphasis supplied.) Finally, in *Illinois v. Caballes*, 543 U.S. 405, 407 (2005), the question before the Court was in a public place or roadway "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to *sniff a vehicle during a legitimate traffic stop.*" (Emphasis supplied.) None of these decisions, or any other decision of the United States Supreme Court, has ever addressed whether the Fourth Amendment requires reasonable, articulable suspicion to justify a dog sniff under the front door of a single family *private residence.* Accordingly, contrary to the assertion of the dissent, there is no "binding United States Supreme Court precedent" to violate. Dissenting op. at 52.

The core of the dissent's opinion fails to accommodate and is built upon a lack of appreciation for the elevated status that a protected private home has in both this Court and the United States Supreme Court. The dissent asserts that "[b]ecause the dog sniff is only capable of detecting contraband, it is *only* capable of detecting that which is not protected by the Fourth

Amendment." Dissenting op. at 69. Perhaps this statement holds true for luggage in a public airport, a package in a public transport and distribution facility, or in a vehicle on a public roadway, but as discussed above, there are many intimate details associated with the content and odors that may flow from the cracks and crevices of a home. Each of the aforementioned items carries an expectation of privacy that is in no way as great as the expectation of privacy that exists in an individual's home. The dissent fails to accommodate and recognize the *increased* expectation of privacy that exists in one's home, an expectation that all courts have recognized as greater than any other. To dismiss the critical difference between this case, involving a dog sniff of an individual's *home*, and the four other cases relied on by the dissent dangerously undermines the most sacrosanct place that is vulnerable to intrusion by the government, our homes.

Further, the complete absence of any United States Supreme Court precedent on dog sniffs of the cracks and crevices of a private home does not in any way preclude this Court from declaring such a search unconstitutional; rather, it empowers this Court to do so. Although it is true that article 1, section 12 of the Florida Constitution requires this Court to "follow the interpretations of the United States Supreme Court with respect to the Fourth Amendment and provide to Florida citizens no

greater protection than those interpretations," *Soca v. State*, 673 So.2d 24, 27 (Fla.1996), it is also true that in the absence of a controlling United States Supreme Court decision, Florida courts are still not prohibited from providing our citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution. *See id.* at 26-27 (citing *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla.1983)).

Third, the lack of a uniform system of training and certification for drug detection canines makes it unconstitutionally difficult for a defendant to challenge a dog sniff after circumstances such as these have occurred. As articulated by the Second District Court of Appeal in *Matheson v. State*, 870 So.2d 8, 14 (Fla. 2d DCA 2003):

> [C]onditioning and certification programs vary widely in their methods, elements, and tolerances of failure. Consider, for example, the United States Customs Service regime:
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> > The Customs Service puts its dog and handler teams through a rigorous twelve-week training course, where only half of the canines complete the training. Customs Service dogs are trained to disregard potential distractions such as food, harmless

> drugs, and residual scents. Agents present distractions during training, and reward the dogs when those diversions are ignored. The teams must complete a certification exam in which the dog and handler must detect marijuana, hashish, heroin, and cocaine in a variety of environments. This exam and the following annual recertifications must be completed perfectly, with no false alerts and no missed drugs. If a dog and handler team erroneously alerts, the team must undergo remedial training. If the team fails again, the team is disbanded, and the dog is permanently relieved from duty.

[Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 410-11 (1997)]. In contrast, the testimony below disclosed that Razor and his handler had undergone just one initial thirty-day training course and one week-long annual recertification course. In neither course was Razor conditioned to refrain from alerting to residual odors. Whereas the Customs Service will certify only dogs who achieve and maintain a perfect record, Razor's certification program accepted a seventy

percent proficiency. *These disparities demonstrate that simply characterizing a dog as "trained" and "certified" imparts scant information about what the dog has been conditioned to do or not to do, or how successfully.*

Finally, dogs themselves vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments and circumstances. "[E]ach dog's performance is affected differently by working conditions and its respective attention span. There is also the possibility that the handler may unintentionally or otherwise prompt his dog to alert." [Max A. Hansen, *United States v. Solis: Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 San Diego L.Rev. 410, 416 (1976)]. The Customs Service monitors its dogs' performance in the field. Recognizing that a dog's ability can change over time, it maintains records for only thirty to sixty days, then discards them because older records are not probative of the dog's skills. *Bird*, 85 Ky. L.J. at 415. The Hillsborough County Sheriff's Office maintained no records of Razor's performance, and his handler had not kept track.

(Emphasis supplied.) Due to the clear lack of uniformity in certification for drug detection dogs, the Second District in *Matheson* held that the fact that a dog is trained and certified, standing alone, is insufficient to establish probable cause to search a home based exclusively on the dog's alert. *See id.* I agree with the sound reasoning articulated in *Matheson*. The complete lack of a uniform or standardized system of certifying drug detection canines renders it unduly burdensome for a defendant to challenge the validity of an intrusive dog sniff into a private home that results in an arrest. Forcing finders of fact to rely exclusively on the assertions of police officers that their own dogs are properly trained is inconsistent with our time honored understanding of due process. Here, the probable cause affidavit simply notes that the drug detection dog received "weekly maintenance training," but does not at all indicate what that training entails or how extensive that training may be. *See Jardines*, 9 So.3d at 2. This statement, void of any specificity or substance, cannot serve as an irrefutable declaration that establishes a dog's ability to detect drugs.

Finally, the dissent asserts that "distinguishing this case from the United States Supreme Court's dog sniff cases based upon the level of embarrassment the majority presumes to be present here is improper." Dissenting op. at 68. This case involves an unconstitutional search of a

private residence by dogs without any verifiable training, the underlying premise of which does not pass constitutional muster. The level of embarrassment suffered by the party that has been searched is not a significant part of the constitutional analysis and does not in any way negate the constitutional invalidity of the search.

We cannot permit the protections of the Fourth Amendment, fragile as they may be, to be decimated piece by piece and little by little until they become mere vestiges of our past. All courts recognize that the home and curtilage of a home are protected and the protection is determined by factors with regard to whether an individual reasonably may expect that the area in question should receive the same status as the home itself. The cracks and crevices around our front doors or windows that may permit air to unintentionally escape are surely in a reasonably free society areas protected by our most cherished document.

PARIENTE and LABARGA, JJ., concur.

POLSTON, J., dissenting.

Because the majority's decision violates binding United States Supreme Court precedent, I respectfully dissent.

Despite the majority's focus upon multiple officers and the supposed time involved in surveillance and in execution of the search warrant,[12] it is undisputed that one dog and two officers were lawfully and briefly present near the front door of Jardines' residence when the dog sniff at issue in this case took place. And despite statements about privacy interests in items and odors within and escaping from a home,[13] the United States Supreme Court has ruled that there are no legitimate privacy interests in contraband under the Fourth Amendment. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) ("Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed 'legitimate.' ") (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

Contrary to the majority's position, the United States Supreme Court has ruled that a dog sniff is not a search within the meaning of the Fourth Amendment because a dog sniff only reveals contraband in which there is no legitimate privacy interest. *See id.* (holding that dog sniff of vehicle was not a search within meaning of Fourth Amendment and explaining that "governmental

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12. *See* majority op. at 2-3, 22, 25-27.

13. *See* special concurrence at 43.

conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.' ") (quoting *Jacobsen*, 466 U.S. at 408); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("Just as in [*United States v. Place*, 462 U.S. 696(1983)], an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics."); *Jacobsen*, 466 U.S. at 124 n. 24 ("[T]he *reason* [the dog sniff in *Place*] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items."); *Place*, 462 U.S. at 707 ("[T]he sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited."). Accordingly, the dog sniff involved in this case, which occurred while law enforcement was lawfully present at the front door, cannot be considered a search in violation of the Fourth Amendment.

I. BACKGROUND

On November 3, 2006, law enforcement received an anonymous tip identifying Jardines' home as a place used to grow marijuana. On December 5, 2006, law enforcement set up surveillance of Jardines' residence. After Detective

Pedraja of the Miami-Dade Police Department had conducted surveillance for fifteen minutes, Detective Bartlet of the Miami-Dade Police Department arrived with a drug-detection dog, Franky. Detective Bartlet and Franky, who was on a six-foot leash, approached the front porch of the residence with Detective Pedraja behind them. Franky began tracking an odor and traced it to the front door, where Franky assumed a sitting position after sniffing at the base of the door, thereby alerting to the scent of marijuana. Detective Bartlet and Franky immediately returned to Detective Bartlet's vehicle. Thereafter, Detective Pedraja smelled the scent of live marijuana at the front door. Detective Pedraja then knocked on the front door, received no response, and noticed that Jardines' air conditioner was running excessively.[14]

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14. According to testimony presented at the suppression hearing, Detective Pedraja remained behind Franky and Detective Bartlet while the dog sniff occurred. And based upon the facts described in the State's response to Jardines' motion to suppress, Sergeant Ramirez and Detective Donnelly established perimeter positions during the dog sniff with agents of the Drug Enforcement Administration (DEA) as a support unit. The State's response also explains that DEA continued surveillance after the sniff while Detective Pedraja obtained a search warrant. Detective Pedraja testified at the suppression hearing that he got in his vehicle and "drove to a location close by" to prepare the warrant. Furthermore, Jardines' motion to suppress states that DEA agents and members of

Based upon this information, a search warrant was obtained, and Jardines' residence was searched. The search resulted in the seizure of live marijuana plants and equipment used to grow those plants. Jardines was charged with trafficking in cannabis and grand theft.

Jardines moved to suppress the seized evidence, arguing that Franky's sniff was an unconstitutional search and that Officer Pedraja's smell of marijuana was tainted by Franky's prior sniff. The trial court granted Jardines' motion. On appeal, however, the Third District reversed, reasoning as follows:

> [F]irst, a canine sniff is not a Fourth Amendment search; second, the officer and the dog were lawfully present at the defendant's front door; and third, the evidence seized would inevitably have been discovered.

State v. Jardines, 9 So.3d 1, 4 (Fla. 3d DCA 2008). In holding that a dog sniff does not constitute a search under the Fourth Amendment, the Third District certified conflict with the Fourth District's

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the Miami-Dade Police Department executed the search warrant "[a]bout an hour later."

decision in *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006).

II. ANALYSIS

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The similar right contained in the Florida Constitution is "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. Therefore, this Court's jurisprudence in this area must conform to the United States Supreme Court's precedent interpreting the Fourth Amendment.

In this case, it is undisputed that law enforcement was lawfully present at Jardines' front door. While the Fourth Amendment certainly protects "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion," *Silverman v. United States*, 365 U.S. 505, 511 (1961), the publicly accessible area around the front door of the home is not accorded the same degree of Fourth Amendment protection. *See, e.g., United States v. French*, 291 F.3d 945, 953 (7th Cir.2002) ("The route which any visitor or delivery man would use

is not private in the Fourth Amendment sense . . . .") (quoting *United States v. Evans*, 27 F.3d 1219, 1229 (7th Cir. 1994)); *United States v. Hersh*, 464 F.2d 228, 230 (9th Cir. 1972) ("Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.") (quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964)). In fact, the majority acknowledges that "one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time." Majority op. at 22 (quoting *State v. Morsman*, 394 So.2d 408, 409 (Fla.1981)).

Furthermore, there are no allegations here that an officer's detection of the scent of marijuana while lawfully present at Jardines' front door would have violated the Fourth Amendment. There are no such allegations because "the police may see what may be seen 'from a public vantage point where [they have] a right to be.' " *Florida v. Riley*, 488 U.S. 445, 449 (1989) (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)) (reversing a decision of this Court that had factually

distinguished a United States Supreme Court decision to hold that a helicopter's flight at 400 feet over property near a home violated the Fourth Amendment); *see also United States v. Ventresca*, 380 U.S. 102 (1965) (search warrant properly based in part upon investigators' smell of odor when they walked in front of home). Or, as the Ninth Circuit plainly put it with regard to the sense of smell, one does not have "a reasonable expectation of privacy from drug agents with inquisitive nostrils." *United States v. Johnston*, 497 F.2d 397, 398 (9th Cir.1974); *see also* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(c), at 575–77 (4th ed. 2004) ("[I]f police utilize 'normal means of access to and egress from the house' for some legitimate purpose, such as to make inquiries of the occupant, to serve a subpoena, or to introduce an undercover agent into the activities occurring there, it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.") (footnotes omitted) (quoting *Lorenzana v. Superior Court*, 511 P.2d 33, 37 (1973)); *United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006) (applying the "plain smell" doctrine).

Accordingly, the only remaining question at issue in this case is whether a law enforcement officer, who is lawfully present at the front door of a private residence, may employ a dog sniff at that

front door. Based upon binding United States Supreme Court precedent, the answer is quite clearly yes.

The United States Supreme Court has explained that "a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' " *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *Ciraolo*, 476 U.S. at 211) (alteration in original).

Additionally, and of great importance here, the United States Supreme Court has held that a dog sniff does not constitute a search within the meaning of the Fourth Amendment because it only reveals contraband and there is no legitimate privacy interest in contraband that society is willing to recognize as reasonable. *See Caballes*, 543 U.S. 405; *Edmond*, 531 U.S. 32; *Place*, 462 U.S. 696; *see also Jacobsen*, 466 U.S. 109.

First, in *Place*, 462 U.S. at 707, the United States Supreme Court stated the following regarding the unique and very limited nature of a dog sniff when holding that a dog sniff of a passenger's luggage in an airport was not a search under the Fourth Amendment:

We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. *Id.*, at 13. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the

> information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

Then, the United States Supreme Court further explained its decision in *Place* when holding in *Jacobsen*, 466 U.S. at 123, that a chemical test of a package did not constitute a search because "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." The Court stated that this holding was "dictated" by *Place* because, "as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment." *Jacobsen*, 466 U.S. at 124.. The Court explained that "the *reason* [the dog sniff in *Place*] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items." *Id.* at 124 n. 24.

Thereafter, in *Edmond*, 531 U.S. at 40, the United States Supreme Court reaffirmed *Place* when briefly discussing why a dog sniff of the exterior of a car stopped at a checkpoint did not constitute a search:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. *See, e.g., Sitz*, [496 U.S.] at 450. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. *See United States v. Place*, 462 U.S. 696, 707 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. *See ibid.* Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." *Ibid. Cf. United States v. Turpin*, 920 F.2d 1377, 1385 (C.A.8 1990).

Finally, in *Caballes*, 543 U.S. at 408–09, the United States Supreme Court again reaffirmed *Place* as well as *Jacobsen* when holding that a dog sniff of the exterior of a vehicle during a lawful traffic stop was not a search because the sniff only

revealed contraband in which there is no legitimate privacy interest:

> [C]onducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.
>
> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. *Jacobsen*, 466 U.S., at 123. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." *Id.*, at 122 (punctuation omitted). In *United States v. Place*, 462 U.S. 696 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "*sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item." *Id.*, at 707; *see*

also Indianapolis v. Edmond, 531 U.S. 32, 40 (2000). . . .

> Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

In *Caballes*, the Court also explained why its dog sniff decisions are consistent with its thermal-imaging decision, namely because—unlike a thermal imaging device—a dog sniff only reveals contraband:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case,

> intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

To summarize, in *Place*, *Jacobsen*, *Edmond*, and *Caballes*, the United States Supreme Court held that dog sniffs are not searches within the meaning of the Fourth Amendment because they only detect contraband and there is no legitimate privacy interest in contraband that society recognizes as reasonable. A vast majority of federal[15] and state[16] courts have interpreted the

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15. *See United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010) (holding that dog sniff of apartment's front door from common hallway was not a search under the Fourth Amendment and rejecting argument that *Kyllo* should be extended to dog sniffs, explaining that "the Supreme Court rejected such an interpretation of *Kyllo* in *Caballes* "); *United States v. Brock*, 417 F.3d 692, 696 (7th Cir. 2005) ("[W]e hold that the dog sniff inside Brock's residence [specifically at the locked door of bedroom rented

by Brock] was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any information about lawful activity over which Brock had a legitimate expectation of privacy."); *United States v. Reed*, 141 F.3d 644, 649–50 (6th Cir. 1998) (holding that dog sniff of flat was not a search when dog was lawfully present in the flat and rejecting argument that *Place* only applies to "public sniffs"); *United States v. Broadway*, 580 F.Supp.2d 1179, 1193 (D.Colo.2008) (rejecting the applicability of *Kyllo*, holding a dog sniff of apartment from hallway and from walkway outside window was not a search under the Fourth Amendment, and explaining that "as long as a canine unit is lawfully present when a drug sniff occurs, the sniff is not a search"); *United States v. Cota–Lopez*, 358 F.Supp.2d 579, 592 (W.D.Tex. 2002) (rejecting argument that the heightened privacy interest makes dog sniff of front door at private residence intrusive, explaining "*Place* and *Jacobsen* compel the conclusion that a canine sniff capable of detecting only the presence or absence of contraband is not a search within the meaning of the Fourth Amendment"), *aff'd*, 104 Fed.Appx. 931 (5th Cir.2004); *United States v. Meindl*, 83 F.Supp.2d 1207, 1216–17 (D. Kan. 1999) (rejecting argument that plain view/smell exception was inapplicable because the dog sniff occurred in a home rather than a public place); *United States v. Tarazon–Silva*, 960 F.Supp. 1152, 1162–63 (W.D. Tex. 1997) (holding dog sniff of the outside of a residence and alert at a dryer vent was not a search when dog and officer had the right to be positioned alongside residence), *aff'd*, 166 F.3d 341 (5th Cir.1998); *see also United States v. Roby*, 122 F.3d 1120, 1124–25 (8th Cir.1997) (holding that a dog sniff in hallway outside hotel room was not a search); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir.1993) (holding that dog sniff of warehouse was not a search because defendant "could have no legitimate expectation that a narcotics canine would not detect the odor of the marijuana stored in the warehouse"); *United States v.*

Seals, 987 F.2d 1102, 1106 (5th Cir.1993) ("A dog 'sniff' is not a search."); *United States v. Vasquez*, 909 F.2d 235, 238 (7th Cir.1990) (concluding that sniff of garage from public alley was not a search); *United States v. Colyer*, 878 F.2d 469, 477 (D.C.Cir.1989) (holding that dog sniff of train sleeper compartment was not a search); *United States v. Burns*, 624 F.2d 95, 101 (10th Cir.1980) (stating that "olfactory activities of a trained police dog legitimately on the premises do not constitute a search" and holding that dog sniff of briefcase in motel room did not violate constitution); *United States v. Marlar*, 828 F.Supp. 415, 419 (N.D.Miss.1993) (holding that dog sniff of motel room door was not a search); *but see United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir.1985) (holding that dog sniff at front door of apartment was a search under the Fourth Amendment requiring warrant based on probable cause); *but cf. United States v. Whitehead*, 849 F.2d 849, 853 (4th Cir.1988) ("[T]he brief exposure of the interior of a train compartment to narcotics detection dogs is constitutionally permissible when based on a reasonable, articulable suspicion that luggage within the compartment contains contraband.").

Somewhat confusingly, while the Second Circuit in *Thomas*, 757 F.2d 1359, held that a dog sniff at a front door of an apartment was a search, the Second Circuit more recently held that a dog sniff in the front yard of a home was not a search because the defendant "had no legitimate expectation of privacy in the front yard of his home insofar as the presence of the scent of narcotics in the air was capable of being sniffed by the police canine." *United States v. Hayes*, 551 F.3d 138, 145 (2d Cir.2008) (citing *Caballes*, 543 U.S. at 409–10, 125 S.Ct. 834).

16. *See State v. Guillen*, 222 Ariz. 81, 213 P.3d 230, 234 (App.2009) ("[W]e join the majority of jurisdictions in concluding that . . . a dog sniff reaching into a home does not

rise to the level of a 'cognizable infringement' under the Fourth Amendment to the United States Constitution."), *vacated on other grounds*, 223 Ariz. 314, 223 P.3d 658 (2010); *Stabler v. State*, 990 So.2d 1258, 1263 (Fla. 1st DCA 2008) (holding that dog sniff at front door of apartment was not a search within the meaning of the Fourth Amendment because "it did not violate a legitimate privacy interest"); *People v. Guenther*, 225 Ill.App.3d 574, 167 Ill.Dec. 705, 588 N.E.2d 346, 350 (1992) (applying *Place* and *Jacobsen* to conclude that "[s]ince a canine sniff does not constitute a search, and the police had probable cause to believe there was marijuana in the living room, the police could have brought in the dog"); *Hoop v. State*, 909 N.E.2d 463, 468 (Ind.Ct.App.2009) (holding that dog sniff at front door of residence was not a search under the Fourth Amendment, explaining that "[a]s long as an officer is lawfully on the premises, the officer may have a dog sniff the residence without implicating the Fourth Amendment"); *Fitzgerald v. State*, 384 Md. 484, 864 A.2d 1006, 1017 (2004) ("[A] dog sniff of the exterior of a residence is not a search under the Fourth Amendment. To be sure, the dog and police must lawfully be present at the site of the sniff."); *People v. Jones*, 279 Mich.App. 86, 755 N.W.2d 224, 228 (2008) (holding that dog sniff outside front door of home was not a search under the Fourth Amendment and explaining that "a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused"); *People v. Dunn*, 77 N.Y.2d 19, 563 N.Y.S.2d 388, 564 N.E.2d 1054, 1056 (1990) (holding dog sniff at door of apartment from common hallway was not a search within the meaning of the Fourth Amendment "[s]ince the 'canine sniff' conducted outside his apartment could reveal only the presence or absence of illicit drugs"); *Romo v. State*, 315 S.W.3d 565, 573 (Tex.App.2010) ("[The dog's] sniffs of the garage door and the backyard fence [which were accessible from public alley]

were not searches under the Fourth Amendment . . . because he sniffed areas that were not protected from observation by passersby and because Romo had no reasonable expectation of privacy in the odor of marihuana coming from his backyard."); *Smith v. State*, No. 01–02–00503–CR, 2004 WL 213395, at *4 (Tex.App.2004) (concluding that dog sniff of house's garage door was not a search under the Fourth Amendment and explaining that "[u]nlike the surveillance device used in *Kyllo*, a drug-dog sniff does not explore the details of a house" because it "can do no more than reveal the presence or absence of contraband"); *Rodriguez v. State*, 106 S.W.3d 224, 229 (Tex.App.2003) (holding that dog sniff of front door of private residence was not a search, reasoning that "a government investigative technique, such as a drug-dog sniff, that discloses only the presence or absence of narcotics, and does not expose noncontraband items, activity, or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and is thus not a 'search' for Fourth Amendment purposes"); *Porter v. State*, 93 S.W.3d 342, 346–47 (Tex.App.2002) (distinguishing *Kyllo* and holding that dog sniff of front door of home was not a search); *see also Nelson v. State*, 867 So.2d 534, 536–37 (Fla. 5th DCA 2004) (holding that dog sniff of hotel room door was not a search); *but see State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805, 816–17, 819 (1999) (holding that a dog sniff of a private residence implicates the Fourth Amendment by relying primarily on other state courts' decisions interpreting state constitutions); *State v. Woljevach*, 160 Ohio App.3d 757, 828 N.E.2d 1015, 1018 (2005) ("The information obtained from the drug-detecting dog is not available to support the warrant, because the use of the dog on appellant's property was a search that, unlike using a drug-detecting dog to sniff around a vehicle on a highway or around luggage in a public place, must itself have been premised on probable cause.").

United States Supreme Court's decisions as holding that dog sniffs are not searches under the Fourth Amendment, even in the context of private residences.[17]

In this case, Franky the dog was lawfully present at Jardines' front door when he alerted to the presence of marijuana. And because, under the binding United States Supreme Court precedent described above, a dog sniff only reveals contraband in which there is no legitimate privacy interest, Franky's sniff cannot be considered a search violating the Fourth Amendment.

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17. Even the dissenting justices in *Caballes* acknowledged that the United States Supreme Court has held that dog sniffs are not searches because they only reveal contraband in which there is no legitimate expectation of privacy protected by the Fourth Amendment. *See Caballes*, 543 U.S. at 411, 125 S.Ct. 834 (Souter, J., dissenting) ("At the heart both of *Place* and the Court's opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband. Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff 'does not implicate legitimate privacy interests' and is not to be treated as a search." (citations and footnote omitted)); *Caballes*, 543 U.S. at 421, 125 S.Ct. 834 (Ginsburg, J., dissenting) ("Dog sniffs that detect only the possession of contraband may be employed without offense to the Fourth Amendment, the Court reasons, because they reveal no lawful activity and hence disturb no legitimate expectation of privacy.").

The majority concludes that the United States Supreme Court's precedent regarding dog sniffs does not apply here because those dog sniff cases did not involve dog sniffs of a home. *See* majority op. at 18. However, the United States Supreme Court did not limit its reasoning regarding dogs sniffs to locations or objects unrelated to the home. There is no language in *Place*, *Jacobsen*, *Edmond*, or *Caballes* that indicates the reasoning that dog sniffs are not searches (because they only reveal contraband in which there is no legitimate expectation of privacy) would change if the cases involved private residences. And, most importantly, the United States Supreme Court issued *Caballes* after its ruling in *Kyllo*, a case involving a home. *Caballes* specifically distinguishes *Kyllo*, not based upon the object sniffed, but by explaining that, unlike the thermal imaging device involved in *Kyllo*, a dog sniff only reveals contraband. *See Caballes*, 543 U.S. at 409–10, 125 S.Ct. 834. Therefore, the very limited and unique type of intrusion involved in a dog sniff is the dispositive distinction under United States Supreme Court precedent, not whether the object sniffed is luggage, an automobile, or a home. Accordingly, the majority's holding based upon the object sniffed is contrary to the United States

Supreme Court's precedent.[18] *Kyllo* is the precedent that is inapplicable to this dog sniff case, not the United States Supreme Court's cases that actually involve dog sniffs.

In addition, the majority distinguishes the binding precedent regarding dog sniffs based upon what it terms "public opprobrium, humiliation and embarrassment." Majority op. at 3, 20, 27, 28–29. By focusing upon the multiple officers and the supposed time involved in surveillance and the execution of the search warrant, the majority concludes that the sniff here was more intensive and involved a higher level of embarrassment than the sniffs involved in *Place*, *Edmond*, and *Caballes*. See majority op. at 22–23, 25–27. However, *Place*, *Edmond*, and *Caballes* all involved law enforcement activity by multiple officers. *See Place*, 462 U.S. at 698–99, (describing law enforcement activity by multiple officers in Miami and two DEA agents in New York); *Edmond*, 531 U.S. at 34–36 (describing law enforcement activity by approximately thirty officers of the Indianapolis

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18. As the highest court in Maryland explained, "The Supreme Court precedent [makes] clear that the status of a dog sniff does not depend on the object sniffed." Fitzgerald, 864 A.2d at 1016. This is so because, as the highest court in New York explained, "[w]hether or not there exists a heightened expectation of privacy, the fact remains that a 'canine sniff' reveals only evidence of criminality." Dunn, 563 N.Y.S.2d 388, 564 N.E.2d at 1057 (citations omitted).

Police Department); *Caballes*, 543 U.S. at 406 (describing law enforcement activity by two officers). And although the majority states that the law enforcement activity in this case "lasted for hours," majority op. at 3, 26, there is no evidence in the record to support that supposition. To the contrary, when asked during the suppression hearing how long he and the dog "remain[ed] on the scene that day," Detective Bartlet responded, "That was a day we were doing multiple operations and I had probably two other people waiting for the dog. So I couldn't have been there much more than five or ten minutes, just enough to grab the information on the flash drive, hand it over and leave." The other specific testimony regarding time in the record is Detective Pedraja's testimony during the suppression hearing explaining that he conducted surveillance for fifteen minutes before approaching the residence with Detective Bartlet and the dog and that it was "approximately 15 to 20 minutes from the time that [he] went to the front door, was standing at the threshold, went to the front door and then came back." Furthermore, as explained above, there are no allegations here that the multiple officers near Jardines' residence violated the Fourth Amendment, regardless of the level of "public opprobrium, humiliation, and embarrassment" that the presence of these officers may have caused Jardines. Therefore, distinguishing this case from the United States Supreme Court's dog sniff cases based upon the

level of embarrassment the majority presumes to be present here is improper.

Finally, it is critical to note that the majority's (and the special concurrence's) assumption that Jardines had a reasonable expectation that the smell of marijuana coming from his residence would remain private is contrary to the explicit pronouncements in *Jacobsen* and *Caballes* that the possessor of contraband has no legitimate expectation of privacy in that contraband. *See United States v. Colyer*, 878 F.2d 469, 475 (D.C. Cir. 1989) ("[T]he Supreme Court's analyses in *Place* and *Jacobsen* indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed."). Indeed, the fact that one has no reasonable expectation of privacy in contraband is precisely why a dog sniff is not a search under the United States Supreme Court's precedent interpreting the Fourth Amendment. Because the dog sniff is only capable of detecting contraband, it is *only* capable of detecting that which is not protected by the Fourth Amendment. *See Caballes*, 543 U.S. at 408, 125 S.Ct. 834 ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.' ") (quoting *Jacobsen*, 466 U.S. at 123, 104 S.Ct. 1652).

III. CONCLUSION

As held by United States Supreme Court, a dog sniff is not a search within the meaning of the Fourth Amendment because it only reveals contraband and there is no legitimate expectation of privacy in contraband that society is willing to recognize as reasonable. Given this binding precedent, Franky's sniff, while lawfully present at Jardines' front door, cannot be considered a search under the Fourth Amendment. Therefore, I would approve the Third District's decision in Jardines and disapprove the Fourth District's contrary decision in Rabb.

Accordingly, I respectfully dissent.

CANADY, C.J., concurs.

Supreme Court of Florida
THURSDAY, JULY 7, 2011

CASE NO.: SC08-2101
Lower Tribunal No(s).: 3D07-1615

JOELIS JARDINES vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

In light of the revised opinion, the Respondent's Motion for Rehearing is hereby denied.

PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.
CANADY, C.J., and POLSTON, would grant.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

jn
Served:
HOWARD KEITH BLUMBERG
CHARMAINE MILLSAPS
HON. WILLIAM LEWIS THOMAS, JUDGE
HON. MARY CAY BLANKS, CLERK
ARTHUR T. DAUS, III
HON. HARVEY RUVIN, CLERK

Third District Court of Appeal
State of Florida, July Term, A.D. 2008

Opinion filed October 22, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D07-1615
Lower Tribunal No. 06-40839

The State of Florida,
Appellant,

vs.

Joelis Jardines,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Bill McCollum, Attorney General, and Rolando A. Soler, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender,

and Jorge Rodriguez and Mariam Deghani, Certified Legal Interns, for appellee.

Before COPE, WELLS, and SALTER, JJ.

WELLS, Judge.

The State of Florida appeals from an order suppressing evidence seized pursuant to a search warrant executed on the home of Joelis Jardines. We reverse because the trial court erred in ruling that the magistrate lacked probable cause to issue the warrant and because the evidence suppressed was admissible under the "inevitable discovery" doctrine.

On December 5, 2006, William Pedraja, an officer with the Miami–Dade Police Department, obtained a search warrant from Miami–Dade County Court Judge George Sarduy. The warrant was supported by a probable cause affidavit which identified the premises to be searched, detailed Officer Pedraja's extensive experience in detecting hydroponic marijuana laboratories and the methods and equipment used in such laboratories, and stated:

> "Your Affiant's" reasons for the belief that "The Premises" is being used as [a marijuana hydroponics grow lab] and that "The Property [consisting of marijuana and

the equipment to grow it]" listed above is being concealed and stored at "The Premises" is as follows:

On November 3, 2006, "Your Affiant" detective William Pedraja, # 1268, received information from a crime stoppers tip that marijuana was being grown at the described residence.

On December 5, 2006, "Your Affiant" conducted surveillance at the residence and observed no vehicles in the driveway. "Your Affiant" also observed windows with the blinds closed. **"Your Affiant" and Detective Doug Bartelt with K–9 drug detection dog "FRANKY" approached "The Premises" in an attempt to obtain a consent to search. While at front door [sic], "Your Affiant" detected the smell of live marijuana plants emanating from the front door of "The Premises."** The scent of live marijuana is a unique and distinctive odor unlike any other odor. Additionally, K–9 drug detection dog "FRANKY" did alert to the odor of one of the controlled substances he is trained to detect. "Your Affiant," in an attempt to obtain a written consent to search, knocked on the front door of "The Premises" without response. "Your Affiant" also heard an air conditioning unit on the west side of the

residence continuously running without recycling. The combination of these factors is indicative of marijuana cultivation.

Based upon the positive alert by narcotics detector dog "FRANKY" to the odor of one or more of the controlled substances that she is trained to detect and "FRANKY" [sic] substantial training, certification and past reliability in the field in detecting those controlled substances, it is reasonable to believe that one or more of those controlled substances are present within the area alerted to by "FRANKY." Narcotics Canine handler, Detective Bartelt, Badge number 4444, has been a police officer with the Miami–Dade Police Department for nine years. He has been assigned to the Narcotics Bureau for six years and has been a canine handler since May 2004. In the period of time he has been with the Department, he has participated in over six hundred controlled substances searches. He has attended the following training and received certification as a canine handler....

Since becoming a team, Detective Bartelt and narcotics detector canine "FRANKY" have received weekly maintenance training.... Narcotics detector canine "FRANKY" is trained to detect the

> odor of narcotics emanating from the following controlled substances to wit: marijuana.... To date, narcotics detector canine "FRANKY" has worked approximately 656 narcotics detection tasks in the field. He has positively alerted to the odor of narcotics approximately 399 times. "FRANKY'S" positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana.
>
> WHEREFORE, Affiant prays that a Search Warrant be issued ... to search "The Premises" above-described....

(Emphasis added).

A search conducted pursuant to the warrant resulted in seizure of live marijuana plants and the equipment used to grow them, and resulted in Jardines being charged with trafficking in cannabis and theft for stealing the electricity needed to grow it.

Jardines, relying primarily on *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006), moved to

suppress[1] arguing that no probable cause existed to support the warrant because: (1) the dog "sniff" constituted an illegal search; (2) Officer Pedraja's "sniff" was impermissibly tainted by the dog's prior "sniff"; and (3) the remainder of the facts detailed in the affidavit were legally insufficient to give rise to probable cause.

We reverse the trial court's determination that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search" and that the evidence seized at Jardines' home must be suppressed. We do so because, first, a canine sniff is not a Fourth Amendment search; second, the officer and the dog were lawfully present at the

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[1] Florida Rule of Criminal Procedure 3.190 provides in pertinent part:

> **(h) Motion to Suppress Evidence in Unlawful Search.**
>
> (1) Grounds. A defendant aggrieved by an unlawful search and seizure may move to suppress anything so obtained for use as evidence because:
>
> ....
>
> (D) there was no probable cause for believing the existence of the grounds on which the warrant was issued.

defendant's front door; and third, the evidence seized would inevitably have been discovered.

A Canine Sniff Is Not A Fourth Amendment Search

In *Illinois v. Caballes*, 543 U.S. 405, 408 (2005), the United States Supreme Court expressly rejected the notion that a "dog sniff itself infringed [a] ... constitutionally protected interest in privacy." In doing so, the Court confirmed that because a dog sniff detects only contraband, and because no one has a "legitimate" privacy interest in contraband, a dog sniff is not a search under the Fourth Amendment.

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. [*United States v. Jacobsen*, 466 U.S. 109, 123, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984)]. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." *Id.*, at

> 122, 104 S.Ct. 1652 (punctuation omitted). In *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "sui generis " because it "discloses only the presence or absence of narcotics, a contraband item." Id., at 707, 103 S.Ct. 2637; *see also Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Respondent likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband."

Caballes, 543 U.S. at 408-9 (some citations omitted).

Based on this reasoning, we reject the notion that *Kyllo v. United States*, 533 U.S. 27 (2001), relied on in *Rabb*, makes a dog's detection of contraband while standing on a front porch open to the public, a search which compromises a legitimate privacy interest. *Kyllo* involved the use of a mechanical device which detected heat radiating from the walls of a home. There, the Court was concerned with the use of constantly improving technological devices that, from outside a home, could intrude into the home and detect legitimate as well as illegal activity going on inside. *Kyllo*, 533 U.S. at 40 ("Where, as here, the Government uses a device that is not in general

public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and presumptively unreasonable without a warrant.").

A dog's nose is not, however, a "device," nor is it improved by technology. Dogs have been used to detect scents for centuries all without modification or "improvement" to their noses. That, perhaps, is why the Supreme Court describes them as "sui generis," in *Place*. *Place*, 462 U.S. at 707. Moreover, and unlike the thermal imaging device at issue in *Kyllo*, a dog is trained to detect only illegal activity or contraband. It does not indiscriminately detect legal activity.

These differences prompted the Court in *Caballes* to note that its conclusion that the dog sniff involved there was lawful was consistent with its earlier decision in *Kyllo*:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect growth of marijuana in a home constituted an unlawful search *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2083 [2038], 150 L.Ed.2d 94 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity-in that case, intimate details

> in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38, 121 S.Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

As recently observed in *People v. Jones*, 755 N.W.2d 224, 228 (2008),[2] a majority of federal circuit courts have viewed the *Place* Court's holding as generally categorizing canine sniffs as nonsearches. *See, e.g., United States v. Reed*, 141 F.3d 644, 648 (6th Cir.1998); *see also United States v. Brock*, 417 F.3d 692 (7th Cir.2005); *United States v. Roby*, 122 F.3d 1120 (8th Cir.1997); *United States v. Vasquez*, 909 F.2d 235

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[2] We commend the Public Defender for the 11th Judicial Circuit, and particularly, Howard K. Blumberg, Esq., for its and his professionalism in bringing this case—which undercuts their position here—to our attention.

(7th Cir.1990).[3] Likewise, "the vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search."[4] *People v. Jones*, 755 N.W.2d at 228.

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[3] *People v. Jones* identifies *United States v. Thomas*, 757 F.2d 1359 (2d Cir.1985), as an exception to the "sniff is not a search" holdings. *People v. Jones*, 755 N.W.2d at 228. *Thomas* was relied on in *Rabb* which we decline to follow. *Rabb*, 920 So.2d at 1184; *but see Nelson v. State*, 867 So.2d 534, 536 (Fla. 5th DCA 2004) (observing "the very correctness of the *Thomas* decision is called into question by its assertion that the defendant 'had a legitimate expectation that the contents of his closed apartment would remain private.' As was shown above, the Supreme Court's analyses in *Place* and *Jacobsen* indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can 'reveal nothing about noncontraband items.' " (quoting *United States v. Colyer*, 878 F.2d 469, 475 (D.C.Cir.1989))).

[4] As listed in *People v. Jones*, the following states, including Florida, have in various contexts concluded that a canine sniff is not a Fourth Amendment search:

> *State v. Box*, 205 Ariz. 492, 496-497, 73 P.3d 623 (Ariz.App.2003); *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004); *People v. Ortega*, 34 P.3d 986, 991 (Colo.2001); *Bain v. State*, 839 So.2d 739 (Fla.App.2003); *Cole v. State*, 254 Ga.App. 424, 562 S.E.2d 720 (2002); *State v. Parkinson*, 135 Idaho 357, 17 P.3d 301 (Idaho App.2000); *People v. Cox*, 318 Ill.App.3d 161, 251 Ill.Dec. 133, 739 N.E.2d 1066 (2000); *Bradshaw v. State*, 759 N.E.2d 271

Thus, as the Fifth District concluded in *Nelson v. State*, 867 So.2d 534, 537 (Fla. 5th DCA 2004):

> The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. *See United States v. Sullivan*, 625 F.2d 9, 13 (4th Cir.1980). Just as evidence in the plain view of officers may

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(Ind.App.2001); *State v. Bergmann*, 633 N.W.2d 328 (Iowa 2001); *State v. Barker*, 252 Kan. 949, 850 P.2d 885 (1993); *State v. Kalie*, 699 So.2d 879 (La.1997); *State v. Washington*, 687 So.2d 575 (La.App., 1997); *Fitzgerald v. State*, 384 Md. 484, 864 A.2d 1006 (2004); *Commonwealth v. Feyenord*, 62 Mass.App. 200, 815 N.E.2d 628 (2004); *Millsap v. State*, 767 So.2d 286 (Miss.App., 2000); *State v. LaFlamme*, 869 S.W.2d 183 (Mo.App.1993); *Gama v. State*, 112 Nev. 833, 920 P.2d 1010 (1996); *State v. Van Cleave*, 131 N.M. 82, 33 P.3d 633 (2001); *People v. Offen*, 78 N.Y.2d 1089, 578 N.Y.S.2d 121, 585 N.E.2d 370 (1991); *State v. Fisher*, 141 N.C.App. 448, 539 S.E.2d 677 (2000); *State v. Kesler*, 396 N.W.2d 729 (N.D.1986); *State v. Rusnak*, 120 Ohio App.3d 24, 696 N.E.2d 633 (1997); *Scott v. State*, 927 P.2d 1066 (Okla.Crim.App.1996); *State v. Smith*, 327 Or. 366, 963 P.2d 642 (1998); *Commonwealth v. Johnston*, 515 Pa. 454, 530 A.2d 74 (1987); *State v. England*, 19 S.W.3d 762 (Tenn.2000); *Rodriguez v. State*, 106 S.W.3d 224 (Tex.App.2003); *State v. Miller*, 256 Wis.2d 80, 647 N.W.2d 348 (Wis.App.2002); *Morgan v. State*, 95 P.3d 802 (Wy.2004).

People v. Jones, 755 N.W.2d at 228 n. 4.

> be searched without a warrant, *see Harris v. United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968), evidence in the plain smell may be detected without a warrant. *See United States v. Harvey*, 961 F.2d 1361, 1363 (8th Cir.1992); *See also Horton v. Goose Creek Independent School District*, 690 F.2d 470, 477 (5th Cir.1982); *United States v. Pinson*, 24 F.3d 1056, 1058 (8th Cir.1994) ("plain feel," no reasonable expectation of privacy in heat emanating from a home).

See Cardwell v. State, 482 So.2d 512, 514 (Fla. 1st DCA 1986) ("Just as no police officer need close his eyes to contraband in plain view, no police officer armed with a sniff dog need ignore the olfactory essence of illegality.").[5]

In sum, "persuasive authority convinces us that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused." *People v. Jones*, 755 N.W.2d at 228.

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[5] Contrary to *Nelson* and *Cardwell*, *State v. Ortiz*, 257 Neb. 784, 801, 600 N.W.2d 805, 819-20 (1999), relied on by the partial dissent, likens the canine sniff to electronic surveillance equipment.

The Officer And The Dog Were Lawfully Present At The Defendant's Front Door

The Fourth Amendment to the United States Constitution clearly protects "the right of the people to be secure in their persons, houses, papers, and effects," from "unreasonable government intrusions into their legitimate expectations of privacy." *Place*, 462 U.S. at 706, 103 S.Ct. 2637 (quoting *United States v. Chadwick*, 433 U.S. 1, 7 (1977)). However "[t]he Fourth Amendment does not necessarily protect areas of a home which are 'open and exposed to public view.' " *State v. Duhart*, 810 So.2d 972, 973 (Fla. 4th DCA 2002).

While this right to, and expectation of, privacy, no doubt, extends to the contents of a home, we need not resolve the extent to which this constitutional protection extends to every entryway in every possible factual scenario. Rather, at issue is this officer's presence at this defendant's front door. Here, police received a tip as to criminal activity and observed other indications of criminal activity. In such circumstances, the officer had every right to walk to the defendant's front door, as a number of Florida cases confirm.

In *State v. Morsman*, 394 So.2d 408, 409 (Fla.1981), the Florida Supreme Court concluded

that a police officer had the right to approach a front door after being told by a neighbor that Morsman was growing marijuana plants in his backyard:

> When the officer went to respondent's front door to investigate the neighborhood complaint, he was not infringing upon respondent's privacy. Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time. *State v. Detlefson*, 335 So.2d 371 (Fla. 1st DCA 1976); *State v. Belcher*, 317 So.2d 842 (Fla. 2d DCA 1975).

Our decision that this officer was lawfully present at defendant's door is likewise consistent with *Potts v. Johnson*, 654 So.2d 596, 597-98 (Fla. 3d DCA 1995). Potts was a police detective investigating a theft and had been given a suspect's name. At the suspect's home, Potts stepped into a hole, was injured, and sued. Discussing Potts' right to be on the property, we observed:

> A police officer in the scope of his duties may approach a suspect's front door and knock in an attempt to talk to that suspect. *See United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *Younger*

> *v. State*, 433 So.2d 636 (Fla. 5th DCA), *rev. denied*, 440 So.2d 354 (Fla.1983). "Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where a salesman or visitor may appear at any time." *State v. Morsman*, 394 So.2d 408, 409 (Fla.1981).

Potts, 654 So.2d at 598.

We also noted:

> The "Plain View" doctrine has frequently been considered an exception to the warrant requirement. In reality, materials that are seized because they are in plain view of an officer who observes from a location where he has a legal right to be are not subject to [a] Fourth Amendment [analysis] ...

Potts, 654 So.2d at 599 n. 5 (quoting *Hornblower v. State*, 351 So.2d 716, 718 n. 1 (Fla.1977)).

Also supporting our conclusion is *State v. Pereira*, 967 So.2d 312, 313 (Fla. 3d DCA 2007). In *Pereira*, officers went to the defendant's home based on an anonymous tip that the defendant was growing marijuana. A detective walked toward the premises and, while standing in front of the premises, smelled marijuana. Officers returned the next day with a narcotics-search dog. Approaching

the front door, the officer again smelled the marijuana, and the canine alerted.

While we chose not to address the legality of the dog sniff, we rested our decision on the officer's right to be on the defendant's front porch:

> We disagree with the defendant's contention that the officers' detection of the odor of marijuana emanating from the defendant's home while standing on the sidewalk and front porch of the defendant's home is an invasion of the defendant's privacy protected by the Fourth Amendment. Admittedly, there was no evidence that the front yard or porch was enclosed by a fence or any other structure and was, in fact, open to public access. We follow those cases which hold that there is no reasonable expectation of privacy at the entrance to property which is open to the public, including the front porch. *See State v. Morsman*, 394 So.2d 408 (Fla.1981); *State v. E.D.R.*, 959 So.2d 1225 (Fla. 5th DCA 2007), and cases cited; *Ramize v. State*, 954 So.2d 754 (Fla. 3d DCA 2007); *Potts v. Johnson*, 654 So.2d 596 (Fla. 3d DCA 1995); *see, e.g., United States v. Cota-Lopez*, 104 Fed.Appx. 931 (5th Cir.2004). *Compare State v. Rabb*, 920 So.2d at 1191.

Pereira, 967 So.2d at 314 (footnote omitted); *State v. E.D.R.*, 959 So.2d 1225, 1226 (Fla. 5th DCA 2007) (concluding that defendant's porch "was not a constitutionally protected area"); *see also State v. Garcia*, 374 So.2d 601, 602–03 (Fla. 3d DCA 1979) (concluding "[w]hen the lawful performance of his duty requires that an officer enter upon private property to make a general inquiry, such an entry is justifiable," and holding that officers smelling "the odor of marijuana smoke" at the front door of a residence was a factor supporting a finding of probable cause).

From these cases, it is clear that Officer Pedraja had a right to approach Jardines' front door. The fact that he waited for the dog and approached with the dog does not change this result, even if the dog alerted before the officer detected the scent. The officer's presence with the dog and their sniff of the odor of marijuana as well as the other facts identified in the probable cause affidavit was sufficient to establish probable cause for the warrant to issue.[6] The trial court erred in

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[6] To our way of thinking, this factual pattern, including the crime stopper tip leading to the officer's presence at defendant's front door meets "option two" of the dissent's "three option" analysis, and the trial court's decision would require reversal on that basis. The officer did not decide to do a random stroll of the neighborhood in search of drugs behind closed doors so there is no need to address such a factual scenario.

concluding that the magistrate lacked probable cause to issue the warrant and erred in suppressing the evidence obtained as a result of the warrant.

Inevitable Discovery

Even if the dog sniff constituted an illegal search, the evidence seized at Jardines' home would still be admissible under the inevitable discovery rule. In *Fitzpatrick v. State*, 900 So.2d 495, 514 (Fla.2005), our Supreme Court explained that illegally seized evidence may still be admitted into evidence if that evidence inevitably would have been discovered by legal means:

> In *Nix v. Williams*, 467 U.S. 431, 448, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court adopted the "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine. Under this exception, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." *Maulden v. State*, 617 So.2d 298, 301 (Fla.1993). In adopting the inevitable discovery doctrine, the Supreme Court explained, "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or

> fairness of a criminal trial." *Nix*, 467 U.S. at 446, 104 S.Ct. 2501. In making a case for inevitable discovery, the State must demonstrate "that at the time of the constitutional violation an investigation was already under way." *Moody v. State*, 842 So.2d 754, 759 (Fla.2003) (quoting *Nix v. Williams*, 467 U.S. 431, 457, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (Stevens, J., concurring in the judgment)); *see also Jeffries v. State*, 797 So.2d 573, 578 (Fla.2001); *Maulden*, 617 So.2d at 301. In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct. *See Moody*, 842 So.2d at 759.

See Moody, 842 So.2d at 759 (confirming that "fruit of the poisonous tree" doctrine does not automatically render all illegally seized evidence inadmissible and that such evidence may be admitted if the State can show that the evidence inevitably would have been discovered in the course of a legitimate investigation); *Rosales v. State*, 878 So.2d 497, 500 (Fla. 3d DCA 2004) ("Evidence which was originally obtained improperly should not be suppressed, provided that it would have been legitimately uncovered pursuant to normal police practices."); *State v. Ruiz*, 502 So.2d 87, 87 (Fla. 4th DCA 1987)

(finding that "to apply this doctrine, there does not have to be an absolute certainty of discovery, but rather, just a reasonable probability" (citing *United States v. Brookins*, 614 F.2d 1037 (5th Cir.1980))); *see also Jeffries*, 797 So.2d at 578 (quoting Ruiz).

Both the affidavit and the evidence adduced below confirm that an investigation was already well under way, and Officer Pedraja had already decided to knock on Jardines' front door to see if he could obtain consent to search, by the time the dog got involved. Thus, even in the absence of the canine sniff, Officer Pedraja would, pursuant to normal police practices, have detected the scent of marijuana as he approached Jardines' door. *See Potts*, 654 So.2d at 599 (confirming that a "police officer in the scope of his duties may approach a suspect's front door and knock in an attempt to talk to that suspect"). With or without the canine alert, the contraband would inevitably have been detected. On this basis alone, the motion to suppress should have been denied. *See Rabb*, 920 So.2d at 1196 n. 8 (Gross, J., dissenting); *see generally Zeigler v. State*, 922 So.2d 384, 385 (Fla. 1st DCA 2006) ("Under the inevitable discovery rule, when evidence is obtained through the result of unconstitutional police procedures, the evidence will still be admissible if it would have been discovered through legal means."). *See Jeffries*, 797 So.2d at 577–78 ("Here, the trial court

determined that Officer Brownfield smelled marijuana when he went to Appellants' stopped vehicle. Had Officer Brownfield immediately explained the reason for the stop when he made personal contact with Appellants, rather than first asking Appellants for their identification, he would have still smelled marijuana and thus developed probable cause to detain Appellants."); *Jones v. State*, 758 So.2d 722, 722 (Fla. 3d DCA 2000) (citing *Maulden*, 617 So.2d at 298, for the proposition that "under 'inevitable discovery' doctrine, evidence obtained as the result of an unlawful search is admissible if the evidence would ultimately have been discovered by legal means"); *A.J.M. v. State*, 746 So.2d 1222, 1225 (Fla. 3d DCA 1999) ("Florida has adopted the inevitable discovery doctrine which provides that 'evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means.'" (quoting *Maulden*, 617 So.2d at 298)).

Conclusion

In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in *Rabb*, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door

of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed.[7] Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with *Rabb*, we certify direct conflict. To the extent that Judge Gross' dissent in *Rabb* is consistent with this analysis we adopt his reasoning as our own. *See Rabb*, 920 So.2d at 1196 (Gross, J., dissenting). Reversed and remanded.

SALTER, J., concurs.

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[7] While we conclude that existing case law, both Federal and State, support our analysis, we, like the dissent, cannot fault the trial court's reliance on *Rabb*. *See Pardo v. State*, 596 So.2d 665, 666–67 (Fla.1992) (observing that "in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court [is] required to follow that decision").

The State of Florida v. Joelis Jardines
Case No. 3D07-1615

COPE, J. (concurring in part and dissenting in part).

The question before us is whether, and to what extent, the Fourth Amendment is applicable when the police seek to use a drug-sniffing dog at the front door of a private home. I agree with that part of the majority opinion which holds that a warrant is not necessary for a drug-dog sniff, and agree on certifying direct conflict with the Fourth District decision in *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006).

I do not agree with the majority opinion's "sniff anytime" rule. We should instead follow those courts which hold that a drug sniff is permissible at the door of a dwelling only if there is a reasonable suspicion of drug activity.

I.

The Miami–Dade County Police Department received a Crime Stoppers tip that marijuana was being grown at the home of defendant-appellee Joelis Jardines. One month later the detective went to the home at 7 a.m. He watched the home for fifteen minutes. There were no vehicles in the

driveway, the blinds were closed, and there was no observable activity.

After fifteen minutes, the dog handler arrived with the drug detection dog. The handler placed the dog on a leash and accompanied the dog up to the front door of the home. The dog alerted to the scent of contraband.

The handler told the detective that the dog had a positive alert for the odor of narcotics. The detective went up to the front door for the first time, and smelled marijuana. The detective also observed that the air conditioning unit had been running constantly for fifteen minutes or so, without ever switching off.[8]

The detective prepared an affidavit and applied for a search warrant, which was issued. A search was conducted, which confirmed that marijuana was being grown inside the home. The defendant was arrested.

The defendant moved to suppress the evidence seized at his home. The trial court conducted an evidentiary hearing at which the detective and the dog handler testified. The trial

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[8] According to the detective, in a hydroponics lab for growing marijuana, high intensity light bulbs are used which create heat. This causes the air conditioning unit to run continuously without cycling off.

court suppressed the evidence on authority of *State v. Rabb*. The State has appealed.

II.

The Fourth Amendment protects "[t]he right of the people to be secure in their ... houses ... against unreasonable searches and seizures...." U.S. Const. amend. IV; Art. I, § 12, Fla. Const.

The majority opinion takes the position that constitutional protection extends only to the interior of a home, and not the front porch. However, the cases the majority relies on do not apply in the present context.

While the United States Supreme Court has "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property," *Kyllo v. United States*, 533 U.S. 27, 32 (2001), the law of trespass is useful by way of analogy. In an ordinary residential neighborhood, a typical home has walkway (or possibly driveway) access leading to the front porch. Although the walkway, driveway, and porch are part of the homeowner's private property, the owner "by implication, invites others to come to his house as they may have proper occasion, either of business, or courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation." *Prior v. White*, 132 Fla. 1, 180

So. 347, 355 (1938) (italics and internal quotation marks omitted). The homeowner may expect a knock at the door from a seller of goods, a solicitor of charitable contributions, or a neighbor on a social call. The postal service will deliver the mail and a delivery truck may drop off a package.

On the other hand, there is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows. The vendor who may hawk his goods during daylight hours is not welcome to knock at the door at two o' clock in the morning.

Turning to crime investigation, it is perfectly acceptable for a detective to come to the front door to speak with the owner. Where the officer has come to the front door to speak to the owner, there is no expectation of privacy regarding any incriminating objects the owner has left in plain view, or in any odors (such as marijuana) that may be emanating from the dwelling. The cases relied on by the majority opinion fall into this fact pattern. *See State v. Morsman*, 394 So.2d 408, 408-09 (Fla.1981) (permissible for officer to go to front door to investigate complaint); *State v. Pereira*, 967 So.2d 312, 314 (Fla. 3d DCA 2007) (officer walked from sidewalk to the home and smelled

marijuana); *State v. E.D.R.*, 959 So.2d 1225, 1226 (Fla. 5th DCA 2007) (officer walked up walkway to determine why several young men were asleep on front porch and observed crack cocaine on E.D.R.'s lap); *Potts v. Johnson*, 654 So.2d 596, 599 (Fla. 3d DCA 1995) (permissible for officer to go to front door to investigate theft); *see also Ramize v. State*, 954 So.2d 754 (Fla. 3d DCA 2007) (no facts given; cites *Morsman* and *Potts*).

But here, too, there are limits. A crime scene investigation unit cannot (absent consent or a warrant) cordon off the front porch and begin dusting the porch for fingerprints, or conduct a microscopic examination for blood stains, or deploy a magnetometer or sonar to determine what lies beneath the porch.

In short, it is inaccurate to say that there is never any reasonable expectation of privacy with regard to the front porch of a house, although it is a more reduced expectation than applies to the house interior.

III.

A number of courts have considered the question how the Fourth Amendment applies in the context of a dog sniff at the door of a house or apartment. Three schools of thought have emerged: (1) A dog sniff of a dwelling is a search

which can only be conducted pursuant to a warrant. *United States v. Thomas*, 757 F.2d 1359, 1366–67 (2d Cir.1985); *Rabb*, 920 So.2d at 1186–87. (2) A dog sniff can only be conducted where there is a reasonable, articulable suspicion of drug activity inside the residence, but no warrant is required. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805, 820 (1999).(3) A dog sniff is not a search and can be conducted without a warrant and without a reasonable suspicion. *People v. Jones*, 279 Mich.App. 86, 755 N.W.2d 224 (2008). *See generally* Brian L. Porto, Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 A.L.R. Fed. 399 (1998); Lewis R. Katz & Aaron P. Golemboewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735 (2007); 1 Wayne R. LaFave, *Search and Seizure*, § 2.2(g) (4th ed. 2004).

Turning to the first alternative—a dog sniff at the front door is a search requiring a warrant—the Second Circuit has explained, "It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can never be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy." *Thomas*, 757 F.2d at 1366 (citing *Katz v. United States*, 389 U.S. 347 (1967)). The courts "have recognized the heightened

privacy interest that an individual has in his dwelling place." *Thomas*, 757 F.2d at 1366; *Kyllo*, 533 U.S. at 34. "Thus, a practice that is not intrusive in a public airport may be intrusive when employed at a person's home." *Thomas*, 757 F.2d at 1366. Because of the defendant's "heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search," *id.* at 1367, for which a warrant was required. The Fourth District reached the same conclusion in *Rabb*, 920 So.2d at 1187.[9]

The second school of thought is that a dog sniff does not require a search warrant, but should instead be allowed on the showing of a reasonable suspicion. The Nebraska Supreme Court explained:

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[9] Questions have been raised about the reliability of dog sniffs. *Illinois v. Caballes*, 543 U.S. 405, 417 (Souter, J., dissenting); Lewis R. Katz and Aaron P. Godemboewski, *supra*, 85 Neb. L.Rev. at 752-65; 1 Wayne R. LaFave, *supra*, § 2.2(g), at 532-34.

Requiring either a warrant or reasonable suspicion addresses this concern by requiring articulable facts pointing to existence of drug activity within the dwelling. In the event of a positive alert by the dog, the affidavit in support of the search warrant for the search of the home will then include the articulable facts plus the sniff, not just the sniff alone.

> We agree with the courts which conclude an individual's Fourth Amendment privacy interests may extend in a limited manner beyond the four walls of the home, depending on the facts, including some expectation of privacy to be free from police canine sniffs for illegal drugs in the hallway outside an apartment or at the threshold of a residence, and that a canine sniff under these circumstances must be based on no less than reasonable, articulable suspicion.

Ortiz, 600 N.W.2d at 817 (Neb.1999).

The Court ruled:

> We believe that there is a Fourth Amendment middle ground applicable to the investigations conducted by police handlers of narcotics detection dogs. On the one hand, much of the law enforcement utility of such dogs would be lost if full blown warrant procedures were required before a canine sniff could be used; but on the other, it is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason. Accordingly, we hold that a narcotics detection dog may be deployed to test for the presence of narcotics ... where:

> (1) the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and
>
> (2) the police are lawfully present in the place where the canine sniff is conducted.

Id. at 816 (quoting *Commonwealth v. Johnston*, 530 A.2d 74, 79 (1987)).

The third school of thought is that a dog sniff is not a search, and there is no reasonable expectation of privacy on a front porch, so that a dog sniff can be conducted at the front door, without a warrant and without having a reasonable suspicion. The majority opinion adopts that position.

A number of courts have expressed concern about the breadth of such a rule. The Fourth District expressed disapproval of the prospect that a drug-sniffing dog could be brought at random to the front door "of every house on a street hoping the dog sniffs drugs inside." *Rabb*, 920 So.2d at 1190. The Nebraska Supreme Court and New York Court of Appeals likewise disapprove the prospect that such a rule would allow drug-sniffing dogs to be brought at random through the corridors of public housing projects. *Ortiz*, 600 N.W.2d at 816

(quoting *People v. Dunn*, 564 N.E.2d 1054, 1058 (1990)). Those jurisdictions conclude that a rule must be crafted which reasonably balances law enforcement and privacy interests.

In my view the balance is best struck by the second option: a drug-dog sniff is permissible only if there is a reasonable suspicion that drugs may be present in the place the police seek to test. As Professor LaFave points out, "with rare exception the [reported] cases have involved situations in which the [dog] alert occurred after a pre-existing reasonable suspicion." 1 Wayne R. LaFave, *supra*, § 2.2(g), at 533-34 (footnotes omitted).

The State argues that the third option—sniff anytime—is correct and is mandated by the United States Supreme Court's decision in *Caballes*, 543 U.S. at 405, but that is not so. In *Caballes*, the defendant was stopped in a legal traffic stop. Although there was no reasonable suspicion of drug activity, the police brought a drug dog to the car, which alerted on the trunk. The Court upheld the search, saying, "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate Fourth Amendment." *Id.* at 410. The State argues that this logic is equally applicable, and dispositive, of a dog sniff at a front door. The State's reliance on *Caballes* is misplaced.

In the first place, the *Caballes* Court was careful to tie its holding to the facts of the case: "the use of a well-trained narcotics-detection dog—one that 'does not expose non-contraband items that otherwise would remain hidden from public view,'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." *Id.* at 409 (citation omitted); *see also id.* at 417 (Souter, J., dissenting) ("The Court today does not go so far as to say explicitly that sniff searches by dogs trained to scent contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car[.]").

Second, the unusual procedural history of the Fourth District's *Rabb* decision indicates that the Court has, for now, decided to leave the issue open. In 2004, the Fourth District issued its initial decision in *State v. Rabb*, 881 So.2d 587 (Fla. 4th DCA 2004), in which it held that a warrant is required for a dog sniff at the door of Rabb's house. *Id.* at 595-96. On the State's petition for writ of certiorari, the United States Supreme Court granted the petition, vacated the judgment, and remanded the matter to the Fourth District for further consideration in light of the Court's 2005 decision in *Caballes*. *Florida v. Rabb*, 544 U.S. 1028 (2005). On remand, the Fourth District

issued a new and more detailed opinion, again deciding that a warrant was necessary for a dog sniff at the front door of the house. *Rabb*, 920 So.2d at 1188-92. Review was denied by the Florida Supreme Court, *State v. Rabb*, 933 So.2d 522 (Fla.2006), and certiorari was denied by the United States Supreme Court in *Florida v. Rabb*, 127 S.Ct. 665 (2006). While the denial of certiorari by the United States Supreme Court has no precedential effect, it certainly indicates that the Court has decided to leave this dog sniff question open for decision another day.

For the stated reasons, we should adopt the middle alternative, which is to allow a drug-dog sniff at a front door if there is a reasonable suspicion of drug activity. When this case was pending in the trial court, the debate was about whether the warrant requirement of *Rabb* should be followed, and there was no consideration of a reasonable suspicion standard. We should therefore remand the case to the trial court to consider whether there was a reasonable suspicion which supported the dog sniff in this case.

IV.

The majority opinion contains an alternative analysis for reversal which is based on the inevitable discovery rule of *Nix v. Williams*, 467 U.S. 431 (1984), and *Fitzpatrick v. State*, 900

So.2d 495, 514 (Fla.2005). The majority opinion reasons that even if the dog sniff must be excluded from consideration, the detective came to the porch after the dog sniff and also smelled marijuana. The majority opinion concludes that the detective's own "sniff" is sufficient to supply probable cause for the issuance of the search warrant. I am unable to agree.

The problem here is that the dog handler went to the porch first, and informed the detective that the dog had a positive alert. It was with the knowledge of the positive alert that the detective then went to the front door and smelled marijuana. In light of this time sequence, the second identification is tainted by the first. That being so, I do not believe that we can reverse the trial court's ruling on the basis of the inevitable discovery rule. I agree with the *Rabb* decision on this point. 920 So.2d at 1191.

V.

Although we are reversing the trial court order, it bears mention that the trial court should not be faulted for its ruling. That is so because under Florida Supreme Court precedent, the trial court had no realistic alternative other than to follow the Fourth District's decision in *Rabb*. The Florida Supreme Court has explained that when "the only case on point on a district [court of

appeal] level is from a district other than the one in which the trial court is located, the trial court [is] required to follow that [other district's] decision." *Pardo v. State*, 596 So.2d 665, 666 (Fla.1992) (quoting *State v. Hayes*, 333 So.2d 51 (Fla. 4th DCA 1976)). The only decision squarely addressing a dog sniff at the front door of a private home was *Rabb*, and the trial court correctly concluded that the court was bound to follow it.

VI.

For the stated reasons, I agree that a search warrant was not required for a dog sniff at the door of a dwelling, and concur in reversing the order now before us. I concur in certifying direct conflict with the Fourth District's decision in *Rabb*.

We should, however, adopt the rule that a reasonable suspicion is required before a drug-dog sniff is allowed at the front door of a dwelling. We should remand for a determination whether a reasonable suspicion existed.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case No. F06-40839

vs.

JUDGE THOMAS

JOELIS ALEX JARDINES,
Defendant

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS ITEMS SEIZED FROM HIS HOUSE

THIS CAUSE having come before this Court on Defendant, JOELIS ALEX JARDINES', motion to suppress evidence seized from his house and this Court having reviewed the motion, the arguments of counsel, the court file and records in this case, and being otherwise fully advised in the premises therin:

A drug detector dog was used to support probable cause for the issuance of a search warrant of the Defendant's house. The Defendant moved to suppress the evidence of drugs recovered from his house as a result of the search warrant. Pursuant to *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006), this Court concludes that law enforcement's use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search.

However, the Court must also consider, absent the dog sniff information, whether any independent and lawfully obtained evidence establishes a substantial basis for concluding that probable cause existed to support the issuance of a search warrant for the Defendant's house.

The probable cause affidavit listed the information provided from a crime stoppers tip that marijuana was being grown at the residence as a basis to support probable cause for the issuance of a search warrant. However, the crime stoppers tip was unverified and came from an unknown individual rather than a qualified confidential informant. Additionally, there was no evidence to suggest the crime stoppers tip was corroborated by any evidence resulting from surveillance of the house. The only other evidence contained in the affidavit was that the window blinds were closed and the air conditioner unit was

constantly running without recycling. This information, considered in its totality, simply does not suggest a fair probability of any broader criminal activity, such as the growing of marijuana in the Defendant's house.[1] Therefore, this Court concludes that no independent and lawfully obtained evidence establishes the probable cause necessary to support the issuance of a search warrant for the Defendant's house.

ORDERED AND ADJUDGED that even with great deference afforded to the search warrant for the Defendant's house in this case, the probable cause affidavit did not provide a "substantial basis for concluding that probable cause existed. Therefore, the motion to suppress evidence seized from the Defendant's house is GRANTED

The parties are hereby notified that they have the right to appeal this order to the District Court of Appeal of Florida, Third District, within thirty(30) days of the signing and filing of this order.

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[1] There was evidence that after the drug detection dog had alerted to the odor of a controlled substance, the officer also detected a smell of marijuana plants emanating from the front door. However, this information was only confirming what the detection dog had already revealed.

DONE AND ORDERED in Miami-Dade County, Florida, on this *13* day of June, 2007.

/s/
HONORABLE WILLIAM THOMAS
CIRCUIT JUDGE

OPPOSITION BRIEF

No. 11-564

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2011

STATE OF FLORIDA, Petitioner,

v.

JOELIS JARDINES, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S AMENDED BRIEF IN OPPOSITION

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit
Of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

HOWARD K. BLUMBERG*
Assistant Public Defender

Counsel for Respondent

*Counsel of Record

QUESTION PRESENTED

Whether the use of a police dog to sniff for illegal drugs at the front entrance of a private residence under the circumstances of this case constituted a Fourth Amendment search?

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STATEMENT OF THE CASE

On November 3, 2006, Detective Pedraja of the Miami-Dade Police Department received an unverified "crime stoppers" tip that marijuana was being grown at the home of Joelis Jardines. One month later, on December 5, 2006, at approximately 7:00 a.m., members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, conducted a surveillance of Jardines' home. Detective Pedraja watched the home for approximately fifteen minutes. During that time, there were no vehicles in the driveway, the blinds were closed, and there was no observable activity.

After the fifteen minute period, Detective Bartelt arrived on the scene with a drug detection dog. Detective Pedraja joined Detective Bartelt and the drug detection dog and together they approached the front of Jardines' home. As Detectives Pedraja and Bartelt and the drug detection dog approached the residence, Sergeant Ramirez and Detective Donnelly of the Miami-Dade Police Department established perimeter positions around the residence and federal DEA agents assumed stand-by positions as backup units.

Detective Pedraja stayed back as Detective Bartelt and the dog proceeded to the front door of the home, because Pedraja would have probably been knocked over by the dog when the dog was spinning around trying to find the source of any odor he detected. The drug detection dog was very strongly driven and he was out in front of Detective Bartelt pulling him around very dramatically. The dog pulled

directly up the porch as he was trained to do, and immediately upon entering the alcove of the porch, he began tracking an airborne odor by bracketing and tracking back and forth to determine the strongest source of the odor, which was the base of the front door of the house. Detective Bartelt got as far back away from the dog as he could without releasing the dog's leash, as the dog was a little bit wild. The dog finally assumed a sitting position after sniffing at the base of the door.

Detective Bartelt then signaled to Detective Pedraja that the dog had given a positive alert for the odor of narcotics. After Detective Pedraja received this signal, he went to the front door of the house and also detected a smell of marijuana plants emanating from the front door. Detective Bartelt and the drug detection dog left the scene shortly after the dog alerted at the front door of the house. Detective Pedraja waited at the residence for fifteen or twenty minutes and then also left the scene to prepare a search warrant and submit it to a magistrate. Federal DEA agents remained behind to maintain surveillance of Jardines' home. Pedraja obtained a search warrant later that day and about an hour after the warrant was obtained, members of the Miami-Dade Police Department, Narcotics Bureau, and DEA agents executed the warrant by gaining entry to Jardines' home through the front door. As agents entered the front door, Jardines exited through a sliding glass door at the rear of the house. Jardines was apprehended by Special Agent Wilson of the DEA and turned over to the Miami-Dade Police Department. A search was conducted, which revealed that marijuana was being grown inside the home.

Jardines was arrested and charged with trafficking in marijuana and theft of electricity.

Jardines subsequently filed a motion to suppress the evidence seized from his house. The trial court granted the motion to suppress, ruling that pursuant to *State v. Rabb*, 920 So. 2d 1175 (Fla. Dist. Ct. App. 2006), *cert. denied*, 549 U.S. 1052 (2006), law enforcement's use of the drug detection dog at the front door of Jardines' house constituted an unreasonable and illegal search. Pet. App. 137.[1] The trial court rejected the State's argument that Detective Pedraja's later detection of the odor of marijuana at the front door constituted a valid basis for the search warrant under the independent source doctrine, based on the court's factual finding that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. *Id.* at 138.

The State of Florida appealed the suppression order to the Florida Third District Court of Appeal, and that court reversed the order granting the motion to suppress. *State v. Jardines*, 9 So.3d 1 (Fla. Dist Ct. App. 2008). The Third District declined to follow the decision in *Rabb*, and held that "a canine sniff is not a Fourth Amendment search." *Jardines*, 9 So.3d at 5. The Third District also held that even if the dog sniff constituted an illegal search, the evidence seized at Jardines' home would still be admissible under the inevitable discovery rule because the evidence presented at the hearing on the motion to suppress established that Detective

[1] In this Brief in Opposition, "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari filed in this case.

Pedraja had already decided to knock on Jardines' front door prior to the time of the dog sniff. *Id.* at 20-21.

On petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District in *Jardines* and approved the result in *Rabb*. Pet. App. 1. The Florida Supreme Court held that "a 'sniff test' such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment." *Id.* at 4. The Florida Supreme Court further held that probable cause must be established prior to conducting such a dog "sniff test" at a private residence. *Id.* at 4-5.

In determining that the use of the police dog to sniff for illegal drugs at the front entrance of Jardines' private residence constituted a Fourth Amendment search requiring probable cause, the Florida Supreme Court examined in great detail the decisions of this Court in *United States v. Place*, 462 U.S. 696 (1983), *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), *Illinois v. Caballes*, 543 U.S. 405 (2005), *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Kyllo v. United States*, 533 U.S. 27 (2001). Pet. App. 14-26. The Florida Supreme Court noted that in *Place*, *Edmond*, *Caballes* and *Jacobsen*, this Court "was careful to tie its ruling to the particular facts of the case." Pet. App. 27. The Florida Supreme Court further noted that the police investigations in the four cases "were conducted in a minimally intrusive manner upon objects—luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen*—

that warrant no special protection under the Fourth Amendment." Pet. App. 28. Finally, the Florida Supreme Court pointed out that the police investigations in the four cases "were not susceptible to being employed in a discriminatory or arbitrary manner--the luggage in *Place* had been seized based on reasonable suspicion; the vehicle in *Edmond* had been seized in a dragnet-style stop; the vehicle in *Caballes* had been seized pursuant to a lawful traffic stop; and the contents of the package in *Jacobsen* had been seized after the package had been damaged in transit by a private carrier." Pet. App. 29.

The Florida Supreme Court then contrasted the nature of the police conduct in *Place*, *Edmond*, *Caballes* and *Jacobsen* with the police conduct in this case. The Florida Supreme Court noted the presence of numerous police officers surrounding Jardines' residence as the police canine handler and the drug detection dog approached the front door of the house. Pet. App. 31-32. The Florida Supreme Court quoted at length the testimony of the police canine handler at the hearing on the motion to suppress in which the officer described in great detail the "vigorous and intensive procedure" used in this case at the front door of Jardines' home. *Id.* at 32-38. Finally, the Florida Supreme Court emphasized that none of the underlying circumstances in *Place*, *Edmond*, *Caballes* and *Jacobsen* which guaranteed objective, uniform application of the police procedures are present when a police dog is allowed to sniff for illegal drugs at the front entrance of a private residence without any prior evidentiary showing of wrongdoing, as "there is simply nothing to prevent the agents from applying the procedure in an arbitrary or

discriminatory manner, or based on whim and fancy, at the home of any citizen." Pet. App. 40-41. Based on these significant differences between the police procedures in *Place*, *Edmond*, *Caballes* and *Jacobsen*, and the police procedures in this case, the Florida Supreme Court concluded that the use of the police dog to sniff for illegal drugs at the front entrance of Jardines' private residence constituted a Fourth Amendment search due to its significant intrusion into the heightened expectation of privacy an individual is guaranteed in a private home by the Fourth Amendment:

> In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment--specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet. App. 42.

Finally, the Florida Supreme Court held that Detective Pedraja's later detection of the odor of marijuana at the front door did not constitute a valid basis for the search warrant, based on the specific factual findings made by the trial court that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. Pet. App. 54-58. The Florida Supreme Court concluded that the Third District erred in reversing the trial court's suppression

order on this basis because "the trial court's factual findings are supported by competent, substantial evidence and the trial court's ultimate ruling is supported in the law." *Id.* at 58.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Florida Supreme Court Applied This Court's Well-Established Fourth Amendment Law To The Particular Facts Of This Case To Reach Its Decision That The Use Of The Police Drug Detection Dog To Sniff For Illegal Drugs At The Front Door Of Mr. Jardines' Private Home Constituted a Fourth Amendment Search.

In its decision in this case, the Florida Supreme Court carefully examined this Court's Fourth Amendment jurisprudence and concluded that application of the principles established by this Court to the particular facts of this case compelled the conclusion that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. This fact-intensive determination by the Florida Supreme Court does not warrant review by this Court.

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v.*

United States, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31.

In determining whether police conduct constitutes a Fourth Amendment search, courts have applied Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967). Justice Harlan pointed out, "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a 'place.' " *Katz*, 389 U.S. at 361. "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211 (1986). "[W]herever an individual may harbor a 'reasonable expectation of privacy' he is entitled to be free from unreasonable governmental intrusion." *Terry v. Ohio*, 392 U.S. 1, 9, (1968) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). In upholding the enhanced aerial photography of an industrial complex in *Dow Chemical v. United States*, 476 U.S. 227, 237, n.4 (1986), this Court noted that it found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," 476 U.S. at 237, n. 4 (emphasis in original).

As the Florida Supreme Court noted in its decision in this case, because the police procedure in this case did take place in an area immediately adjacent to a private home, where privacy expectations are most heightened, this Court's decision in *Kyllo* is particularly relevant to the issue of whether the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. Pet. App. 23-26. In *Kyllo*, this Court held that the use of a thermal imaging device by law enforcement officers standing outside a private home to determine the heat radiating from the external surface of the house and thereby determine the relative heat of various rooms in the house, constituted a Fourth Amendment search. This holding was based in large part on the heightened privacy expectations an individual possesses in the home:

> We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S., at 590, 100 S.Ct. 1371. That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.
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> > "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925).
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> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Kyllo, 533 U.S. at 40.

In its decision in this case, the Florida Supreme Court applied these well-established legal principles to the particular facts of this case and determined that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. The Florida Supreme Court recognized that police officers generally may approach the front door of a private residence without a warrant and knock on the front door in the hope that someone will open the front door and talk to the officers. Pet. App. 31. *See Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011).[2] However, the Florida Supreme Court pointed out that what happened at the front door of Mr. Jardines' private residence went far beyond a simple "knock and talk" by law enforcement officers.

Members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, set up a surveillance of Jardines' home prior to the time the drug detection dog was brought to the front of Jardines' house. Pet. App. 31. As two detectives of the Miami-Dade Police Department approached the residence with the drug detection dog, two other detectives from that Department established perimeter positions around the residence and federal DEA agents assumed stand-by positions as backup units. *Id.* at 31-32. As the two Miami-Dade detectives got

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[2] In its petition, the State of Florida misrepresents that the Florida Supreme Court concluded "that officers may not knock on the front door of a house lest they frighten the homeowner . . ." *See* State Pet. 23. The Florida Supreme Court expressly recognized that generally nothing prevents a police officer from walking up to the front door of a house and knocking on the door: "[P]olice generally may initiate a 'knock and talk' encounter at the front door of a private residence without any prior showing of wrongdoing . . ." Pet. App. 31.

closer to the front of the residence, one of them stayed back from the drug detection dog because he would have probably been knocked over by the dog when the dog was spinning around trying to find the source of any odor he detected. *Id.* at 38. The drug detection dog was very strongly driven and he was out in front of the police canine handler pulling him around very dramatically. *Id.* at 32. The dog pulled directly up to the porch as he was trained to do, and immediately upon entering the alcove of the porch, he began tracking an airborne odor by bracketing and tracking back and forth to determine the strongest source of the odor, which was the base of the front door of the house. *Id.* at 32-34. The police canine handler got as far back away from the dog as he could without releasing the dog's leash, as the dog was a little bit wild. *Id.* at 35-36. The dog continued bracketing and tracking back and forth at the front door of the house until the dog finally assumed a sitting position after sniffing at the base of the door. *Id.* at 36.[3]

After detailing these facts concerning the particular "sniff test" which was conducted by the law enforcement officers in this case, the Florida Supreme Court concluded that "sniff test" constituted a Fourth Amendment search due to its significant degree of intrusiveness into the heightened expectation of privacy the Fourth Amendment guarantees to an individual in a private home:

> In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment,

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[3] This testimony of the police canine handler quoted in the decision of the Florida Supreme Court belies the State of Florida's claim in its petition that "Nor was there a 'vigorous search effort' at the front door; all Franky really did was breath [sic]." State Pet. 23.

> and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment--specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet. App. 42.

Contrary to the claim made by the State of Florida in its petition, the Florida Supreme Court did not rely on *Kyllo* based on any similarities between the thermal imaging device in *Kyllo* and the drug detection dog used in this case. The Florida Supreme Court did not conclude that the drug detection dog in this case was advancing technology similar to the thermal imaging device in *Kyllo*. Rather, the Florida Supreme Court only relied on the principles of law in *Kyllo* concerning the heightened expectation of privacy in the home. The Florida Supreme Court held that a search occurred in this case because the particular nature of the police procedure employed, with multiple police officers conducting a surveillance of the house and then multiple police officers setting up a perimeter around the house as the dog approached the front door, in conjunction with the particular actions of the particular dog in this case[4] as it wildly bracketed back and forth in front of the door attempting to identify odors coming from inside the house through the base of the front door, infringed upon an expectation of privacy which society was not prepared

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[4] In its petition, the State of Florida gives the impression that the drug detection dog in this case was a "Chocolate Labrador Retriever[]" which is a "common household pet[]." State Pet. 23. Although the decision of the Florida Supreme Court does not mention the breed of the drug detection dog used at Mr. Jardines' home, larger breeds such as German shepherds or Belgian malinois are generally used for drug detection purposes. *See* Lunney, "*Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*" 88 Or. L. Rev. 829, 835 (2009).

to consider reasonable considering the heightened expectation of privacy an individual possesses in the home.

The State's petition asserts that the Florida Supreme Court "created a new Fourth Amendment test for whether conduct is a search based on whether the officer's conduct constitutes a 'public spectacle' and is 'dramatic government activity.'" State Pet. 24. The Florida Supreme Court did not announce any type of new test for determining whether the conduct of law enforcement officers constitutes a search. The Florida Supreme Court faithfully followed this Court's precedent in determining that the conduct of the law enforcement officers in this case constituted a Fourth Amendment search. This Court frequently examines the level of intrusiveness of a particular police procedure to determine if that procedure constitutes a Fourth Amendment search. In deciding that the dog sniff of luggage in *United States v. Place*, 462 U.S. 696 (1983) was not a search, this Court pointed out that "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search." *Id.* 462 U.S. at 707. This Court also considered the level of embarrassment and inconvenience suffered by the owner of the property in determining that the dog sniff of the luggage was not a search, noting, "This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Id.*

Similarly, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court focused on the minimal nature of the intrusion involved in deciding that the dog

sniff of the vehicle was not a search, pointing out, "Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'" *Edmond*, 531 U.S. at 40; *see also Terry*, 392 U.S. at 19 n. 15 ("In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness"); *Ciraolo*, 476 U.S. at 213 (holding that observations made by police officers in an airplane flying over a house did not constitute a search and noting that the observations were made "in a physically nonintrusive manner").

Based on this Court's focus in *Place* and *Edmond* on the minimal nature of the intrusion and lack of embarrassment and inconvenience to the owner of the property to determine that the dog sniffs in those cases did not constitute Fourth Amendment searches, the Florida Supreme Court properly emphasized th increased level of intrusiveness and the significant level of embarrassment suffered by the owner of the home in this case as a result of the police conduct to determine that this particular dog sniff did constitute a search. The Florida Supreme Court's consideration of the exposure of the resident of a private residence to "public opprobrium, humiliation and embarrassment," Pet. App. 42, is fully consistent with this Court's consideration in *Place* of the fact that the limited nature of the police procedure in that case "ensures that the owner of the property is not subjected to

the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Place*, 462 U.S. at 707.

Thus, the Florida Supreme Court's holding that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' residence constituted a Fourth Amendment search under the particular facts of this case fully comports with this Court's Fourth Amendment jurisprudence on determining whether police conduct constitutes a Fourth Amendment search.

II. The Decision Of The Florida Supreme Court Does Not Conflict With Any Decisions Of This Court Or Any Decisions Of Federal Circuit Courts of Appeal On The Issue Of Whether A Dog Sniff Constitutes a Fourth Amendment Search.

The Florida Supreme Court's fact-specific assessment of the use of the police drug detection dog in this case to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence, and the court's holding based on that fact-specific assessment that the use of the dog constituted a Fourth Amendment search, does not conflict with any of the decisions cited by petitioner, and therefore no basis for this Court's exercise of its certiorari jurisdiction has been demonstrated.

A. There Is No Conflict With Supreme Court Precedent.

As noted by the Florida Supreme Court in its decision in this case, this Court has addressed the issue of "sniff tests" by drug detection dogs in three cases. Pet. App. 14. First, in *Place*, this Court addressed the issue of whether police could temporarily seize a piece of luggage at an airport and then subject the luggage to a

"sniff test" by a narcotics detection dog. After determining that the detectives' ninety-minute detention of the luggage was too lengthy to be supported under *Terry*, this Court issued the following ruling as to the "sniff test" by the drug detection dog:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
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> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a "search" within the meaning of the Fourth Amendment.

Place, 462 U.S. at 707.

Next, in *Edmond*, this Court addressed the issue of a "sniff test" by a drug detection dog of the exterior of a vehicle which had been stopped at a dragnet-style drug interdiction checkpoint. This Court found that the checkpoint seizure violated the Fourth Amendment, and then stated the following concerning the canine sniff at the exterior of the vehicle:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.

> The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. *See United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. *See ibid.* Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." *Ibid.*

Edmond, 531 U.S. at 40 (citation omitted) (quoting *Place*, 462 U.S. at 707).

Finally, in *Illinois v. Caballes*, 543 U.S. 405 (2005), this Court ruled that a "sniff test" by a drug detection dog of the exterior of a vehicle during the course of a lawful traffic stop did not constitute a Fourth Amendment search:

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. *Jacobsen*, 466 U.S., at 123, 80 L. Ed. 2d 85, 104 S. Ct. 1652. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." *Id.*, at 122, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (punctuation omitted). In *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." *Id.*, at 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637; *see also Indianapolis v. Edmond*, 531 U.S. 32, 40, 148 L. Ed. 2d 333, 121 S. Ct. 447 (2000). . . . .
>
> Accordingly, the use of a well-trained narcotics-detection dog--one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637 --during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Caballes, 543 U.S. at 408-09.[5] This Court distinguished its decision in *Kyllo* as follows:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity--in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38, 150 L. Ed. 2d 94, 121 S. Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

As the Florida Supreme Court also noted in its decision in this case, this Court's decision in *United States v. Jacobsen*, 466 U.S. 109 (1984) is also relevant to the issue of whether a "sniff test" by a drug detection dog constitutes a Fourth Amendment search. Pet. App. 21-23. In *Jacobsen*, this Court ruled that warrantless field testing of white powder suspected to be contraband was not a search under the Fourth Amendment because it compromised no legitimate interest in privacy. *Id.* at 123. This Court stated this conclusion was "dictated" by *Place* and noted that "here, as in *Place*, the likelihood that official conduct of the kind

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[5] In its petition, the State of Florida mistakenly gives the impression that this Court held in *Caballes* that a dog sniff at a house is not a search: "The Florida Supreme Court's holding that a dog sniff is a search conflicts with this Court's repeated holdings, in various contexts, that a dog sniff is not a search. It conflicts with this Court's most recent explanation in *Caballes* extending that view to houses." State Pet. 14.

disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment." *Jacobsen*, 466 U.S. at 124.

In its decision in this case, the Florida Supreme Court examined in great detail the decisions of this Court in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and went to great lengths to explain why those decisions did not require a holding that the use of the police drug detection dog in this case to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence did not constitute a Fourth Amendment search. First, the Florida Supreme Court noted that in each of the four cases, this Court's ruling that no Fourth Amendment search had taken place was expressly limited to the specific facts of the case:

> We note, however, that in each of the above cases, the United States Supreme Court was careful to tie its ruling to the particular facts of the case. *See Place*, 462 U.S. at 707 ("[W]e conclude that the particular course of investigation that the agents intended to pursue here--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a "search" within the meaning of the Fourth Amendment."); *Edmond*, 531 U.S. at 40 ("The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search."); *Caballes*, 543 U.S. at 409 ("In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."); *Jacobsen*, 466 U.S. at 123 ("It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised."). Nothing in the above cases indicates that the same analysis would apply to a dog "sniff test" conducted at a private residence.

Pet. App. 27-28.

Next, the Florida Supreme Court pointed out the minimally intrusive nature of the police procedures in each of the four cases:

> Significantly, all the sniff and field tests in the above cases were conducted in a minimally intrusive manner upon objects--luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen*--that warrant no special protection under the Fourth Amendment. All the tests were conducted in an impersonal manner that subjected the defendants to no untoward level of public opprobrium, humiliation or embarrassment. There was no public link between the defendants and the luggage as it was being tested in *Place* or the package as it was being tested in *Jacobsen*, and the defendants retained a degree of anonymity during the roadside testing of their vehicles in *Edmond* and *Caballes*.

Pet. App. 28-29.

Finally, the Florida Supreme Court distinguished *Place*, *Edmond*, *Caballes*, and *Jacobsen* based on the fact that the object subjected to the police procedure in each of those cases had been previously seized by police officers in an objective and nondiscriminatory manner, and not simply based on the arbitrary whim of law enforcement officers:

> Further, and more important, under the particular circumstances of each of the above cases, the tests were not susceptible to being employed in a discriminatory or arbitrary manner--the luggage in *Place* had been seized based on reasonable suspicion; the vehicle in *Edmond* had been seized in a dragnet-style stop; the vehicle in *Caballes* had been seized pursuant to a lawful traffic stop; and the contents of the package in *Jacobsen* had been seized after the package had been damaged in transit by a private carrier. All these objects were seized and tested in an objective and nondiscriminatory manner, and there was no evidence of overbearing or harassing government conduct. There was no need for Fourth Amendment protection. As explained below, however, such is not the case with respect to a dog "sniff test" conducted at a private residence.

Pet. App. 29.

The Florida Supreme Court then conducted a fact-intensive comparison between the minimally intrusive police procedures in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and the "sniff test" conducted by the police officers and the drug detection dog in this case. The Florida Supreme Court noted the surveillance of Mr. Jardines' home by multiple police officers from different police agencies prior to the time the drug detection dog was brought to the front of the house. Pet. App. 31. The Florida Supreme Court pointed out that as the two detectives of the Miami-Dade Police Department approached the residence with the drug detection dog, the remaining detectives and federal agents established perimeter positions around the residence and assumed stand-by positions as backup units. *Id.* at 31-32. The Florida Supreme Court detailed the vigorous actions of the drug detection dog as it approached the front of the house and once the dog reached the front door of the house and started tracking back and forth at the front door of the house *Id.* at 32-34. One of the detectives approaching the house had to stay well back of the dog to keep from getting knocked over, and the police dog handler got as far back away from the dog as he could without releasing the dog's leash because of the dog's wildness. *Id.* at 35-36, 38.

This fact-intensive comparison between the minimally intrusive police procedures found not to constitute Fourth Amendment searches in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and the "sniff test" conducted by the police officers and the drug detection dog in this case, was one of the major factors which led the Florida Supreme Court to find that the police procedure in this case did constitute a Fourth

Amendment search. The Florida Supreme Court also pointed out the need for Fourth Amendment protection where police officers conduct a "sniff test" using a drug detection dog at a private residence without any antecedent objective and nondiscriminatory basis for that police procedure:

> [I]f government agents can conduct a dog "sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. *Cf. Camara v. Mun. Court of City & Cnty. of S. F.*, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). Such an open-ended policy invites overbearing and harassing conduct.

Pet. App. 41 (footnote omitted).

The Florida Supreme Court did not in any way question this Court's repeated declarations that dog sniffs in general are "sui generis" because they only reveal the presence of contraband. Rather, after carefully comparing the nature of the police procedures in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and the "sniff test" conducted by the police officers and the drug detection dog in this case, the Florida Supreme Court concluded that the "sniff test" in this case constituted a Fourth Amendment search due to its significant degree of intrusiveness into the heightened expectation of privacy an individual is guaranteed in a private home by the Fourth Amendment:

> In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth

> Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment--specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet. App. 42.

B. There Is No Conflict With Any Decisions Of Federal Circuit Courts of Appeal.

The State of Florida claims that the decision of the Florida Supreme Court directly conflicts with the decision of the Eighth Circuit in *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011), and the decision of the Seventh Circuit in *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005). However, this claim demonstrates the State of Florida's failure to appreciate the constitutional significance of the fact that the dog sniff in this case occurred at the front door of a private residence, under factual circumstances involving a significant intrusion into the heightened expectations of privacy an individual possesses at such a private residence.

In *Scott*, the Eighth Circuit held that a dog sniff at the front door *of an apartment from a shared hallway* did not constitute a Fourth Amendment search. 610 F.3d at 1016. Acting on information supplied by a confidential informant, a single police officer brought a drug detection dog into the common hallway of Building 44 of an apartment complex. *Id* at 1011-12. The dog sniffed the door frame of the apartment from the common hallway and alerted to the odor of narcotics. *Id* at 1012. The officer then left the apartment complex and applied for a

warrant based on the dog's alert. *Id.* The Eighth Circuit held that the "sniff of the apartment door frame from a common hallway did not constitute a search subject to the Fourth Amendment." *Id.* at 1016.

Similarly, in *Brock*, the Seventh Circuit held that a dog sniff *at a bedroom door from a shared area inside the defendant's residence*, where police were legally present by consent, did not constitute a Fourth Amendment search. 417 F.3d at 697. In reaching this holding, the Seventh Circuit emphasized that its holding was dependent in large part on the particular location where the dog sniff took place, stating, "Critical to our holding that the dog sniff in this case was not a Fourth Amendment search is the fact that police were lawfully present inside the common areas of the residence with the consent of Brock's roommate." *Id.*

The dog sniff in this case did not take place at the door of an apartment from a common hallway in a large apartment complex, or at a bedroom door from a common area inside the defendant's residence, where police were legally present by consent. As emphasized by the Florida Supreme Court in its decision, the dog sniff in this case occurred at the front door of a private residence.[6] Additionally, neither *Scott* nor *Brock* involved factual circumstances such as those present in this case, where multiple police officers conducted a surveillance of the house, multiple police officers set up a perimeter around the house as the dog approached the front door, and then the dog wildly bracketed back and forth in front of the door attempting to identify odors coming from inside the house through the base of the front door.

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[6] In its decision in this case, the Florida Supreme Court expressly noted the distinction between a dog sniff conducted at a private residence and a dog sniff conducted at an apartment. Pet. App. 11 n.3.

Thus, the decision of the Florida Supreme Court in this case does not conflict with the decision of the Eighth Circuit in *Scott* or the decision of the Seventh Circuit in *Brock*. Indeed, the State's petition does not cite a single state or federal decision which holds that a dog sniff conducted at the front door of a private residence does not constitute a Fourth Amendment search. *See United State v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998)(holding that sniff by dog already lawfully inside defendant's home did not constitute a search); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997)(holding that dog sniff conducted in corridor outside defendant's hotel room was not a search); *cf. United States v. Byle*, 2011 WL 1983355 (M.D. Fla. May 20, 2011)(denying motion to suppress based on finding that officers' smelling marijuana before dog alerted at front door of private residence was sufficient probable cause to support a search warrant; distinguishing *Jardines* and disagreeing with its legal analysis). The only two state or federal decisions which do squarely decide this issue, the decision of the Florida Supreme Court in this case and the decision of the Florida Fourth District Court of Appeal in *Rabb*, both hold that a dog sniff conducted at the front door of a private residence does constitute a Fourth Amendment search. Accordingly, there is no conflict of decisions on this issue warranting review by this Court.

III. The Decision of the Florida Supreme Court Lacks Exceptional Importance.

The Florida Fourth District Court of Appeal first held that the use of a police dog in that case to sniff for illegal drugs at the front entrance of the defendant's private residence constituted a Fourth Amendment search in *State v. Rabb*, 881 So.

2d 587 (Fla. Dist Ct. App. 2004). On the State of Florida's petition for writ of certiorari, this Court granted the petition, vacated the judgment, and remanded the matter to the Fourth District for further consideration in light of this Court's 2005 decision in *Caballes*. *Florida v. Rabb*, 544 U.S. 1028 (2005). On remand, the Fourth District issued a new and more detailed opinion, again deciding that the use of the police dog in that case to sniff for illegal drugs at the front entrance of the defendant's private residence constituted a Fourth Amendment search. *State v. Rabb*, 920 So. 2d 1175 (Fla. Dist Ct. App. 2006). Review was denied by the Florida Supreme Court, *State v. Rabb*, 933 So. 2d 522 (Fla. 2006).

The State of Florida then filed a petition for writ of certiorari in this Court seeking review of the Fourth District's decision holding that the use of a police dog in that case to sniff for illegal drugs at the front entrance of the defendant's private residence constituted a Fourth Amendment search. The petition for writ of certiorari filed by the State of Florida in *Rabb* presented essentially the same question which is presented to this Court in the petition for writ of certiorari filed in this case. The State of Florida's petition for writ of certiorari in *Rabb* was denied in *Florida v. Rabb*, 549 U.S. 1052 (2006).

The decision of the Florida Supreme Court in this case approves the result of the Florida Fourth District Court of Appeal in *Rabb*, and holds that the use of a police dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence under the circumstances of this case constituted a Fourth Amendment search requiring probable cause. Pet. App. 1. There have been no significant

developments in this area of the law since this Court's denial of certiorari in *Rabb*. This Court has not issued any additional decisions on the issue of whether the use of a police dog to sniff for illegal drugs constitutes a Fourth Amendment search. The petition for writ of certiorari filed by the State of Florida in this case does not cite a single decision from a state or federal court which holds that the use of a police dog to sniff for illegal drugs at the front entrance of a private residence does not constitute a Fourth Amendment search requiring probable cause. Thus, the constitutional landscape is essentially the same today as it was five years ago when this Court declined to address essentially the same question which the State seeks to have this Court address in its petition filed in this case.

Finally, the State of Florida's claim that the decision of the Florida Supreme Court has resulted in a crippling effect on law enforcement's ability to detect marijuana grow houses is greatly overstated. As demonstrated by the facts of this case, law enforcement officers are trained to detect the odor of marijuana using their ordinary senses. Additionally, as recognized by the decision of the Florida Supreme Court in this case, "[P]olice generally may initiate a 'knock and talk' encounter at the front door of a private residence without any prior showing of wrongdoing . . ." Pet. App. 31. Thus, nothing in the decision of the Florida Supreme Court in this case prevents law enforcement officers from approaching the front door of a house to initiate a "knock and talk" and seeking a search warrant if they

happen to smell marijuana coming from the house when the officers are at the front door.[7]

The Florida Supreme Court's decision in this case is a fact-intensive determination that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. That determination fully comports with this Court's jurisprudence on determining whether police conduct constitutes a Fourth Amendment search. The holding of the Florida Supreme Court does not conflict with any decisions of this Court or any decisions of federal circuit courts of appeal on the issue of whether a dog sniff constitutes a Fourth Amendment search. Accordingly, certiorari review of the decision of the Florida Supreme Court is not warranted.

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[7] Contrary to the claim made by the State of Florida in its petition, the Florida Supreme Court did not rule in this case that "every time a human officer subsequently smells the same odor as the dog, the human officer's smell is always and irretrievably contaminated by the dog's original alert." State Pet. 30. The Florida Supreme Court held that Detective Pedraja's later detection of the odor of marijuana at the front door did not constitute a valid basis for the search warrant, based on the specific factual findings made by the trial court that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. Pet. App. 54-58. Thus, if the State of Florida had been able to factually establish that Detective Pedraja would have gone to the front door independently of the dog sniff by the drug detection dog, the independent source doctrine would have allowed Pedraja's smell of the marijuana to be considered. However, as the trial court in this case specifically found that Detective Pedraja would not have gone to the front door of the house independent of the dog sniff, the independent source doctrine has no application here.

CONCLUSION

This Court should deny the State of Florida's petition for a writ of certiorari.

Respectfully submitted,

CARLOS J. MARTINEZ
Public Defender
Eleventh Judicial Circuit
Of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

By: _____
HOWARD K. BLUMBERG*
Assistant Public Defender
Fla. Bar No. 264385

Counsel for Respondent

*Counsel of Record

REPLY BRIEF

RECORD
AND
BRIEF

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No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, *Petitioner,*

v.

JOELIS JARDINES

On Petition for Writ of Certiorari to the Supreme Court of Florida

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PAMELA JO BONDI
Attorney General of Florida
Tallahassee, Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
Charmaine M. Millsaps
Assistant Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
Carolyn.Snurkowski@myfloridalegal.com
Counsel for State of Florida
**Counsel of Record*

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ARGUMENT

The two issues that Petitioner, the State of Florida, seeks to raise in this Court are not issues concerning the Florida Supreme Court making erroneous factual findings or misapplying a properly stated rule of law. S.Ct. rule 10. Rather, the Florida Supreme Court has misinterpreted the Fourth Amendment and that misinterpretation warrants this Court's review.

Jardines argues that the Florida Supreme Court prohibiting a dog sniff of a private residence is a correct interpretation of the Fourth Amendment due to the heightened protection afforded private residences under the Fourth Amendment and that *Jardines v. State*, · So.3d ·, 2011 WL 1405080 (Fla. April 14, 2011), follows this Court's well-established Fourth Amendment jurisprudence as announced in *Kyllo v. United States*, 533 U.S. 27 (2001). BIO at 12. But *Kyllo* does not apply to dog sniffs as this Court explained in *Illinois v. Caballes*, 543 U.S. 405 (2005). *Caballes* applies when a dog is involved; *Kyllo* does not. The Florida Supreme Court looked only at the fact that a house was involved, not at the fact that a dog was involved. The Florida Supreme Court's decision does not comport with this Court's Fourth Amendment jurisprudence as expressed in *Caballes*.

Jardines attempts to characterize the issues in this case as being fact-bound. He uses the phrases "fact-intensive," "fact-specific," and "the particular facts of this case" five times in his brief in opposition. BIO at 7, 15, 21, 28. But whether the Fourth Amendment is violated when a trained narcotics dog sniffs the front door of a grow house is not a fact-bound issue. In all these types of cases, an officer leads his trained narcotics dog to a private residence and the dog alerts. The only factual difference in most dog sniff cases is the name of the dog. While Jardines claims the case is

fact-bound, he points to no unique or unusual facts, or even, convoluted facts. The facts can be stated in one short sentence. Two officers and one narcotics dog went to the front porch of a suspected grow house where the dog alerted on the front door. Jardines, while never explicit, seems to rely upon the fact that a drug task force was involved in this case. BIO at 10, 12. But a drug task force where state law enforcement operates in conjunction with the federal Drug Enforcement Agency is not unusual. The caselaw is replete with use of the phrase "drug task force" and DEA. Furthermore, the second issue relates to the involvement of the DEA. The case is not fact-bound and it presents an excellent vehicle to address the two issues presented.

I. Conflict with other courts

Conflict with this Court

Jardines asserts there is no conflict with the Florida Supreme Court's decision in this case and this Court's decisions in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Illinois v. Caballes*, 543 U.S. 405 (2005), because none of these cases involved a house. BIO at 15-23. Jardines is correct that *Place* involved a dog sniff of luggage at the airport; *Edmond* involved a dog sniff of a car at a

checkpoint; and *Caballes* involved a dog sniff of a car during a traffic stop. None of these cases involved a dog sniff of a house. But this Court's reasoning in *Place* and *Caballes* did not focus on the place or the item being examined; rather, this Court focused on the nature of a dog sniff. Moreover, while none of these three cases involved a house, *Kyllo* certainly did. *Kyllo* involved the search of a home with a thermal imagining device. This Court in *Caballes*, explaining *Kyllo*, stated:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38, 121 S.Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from

> respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-410. The Florida Supreme Court quoted this critical paragraph of *Caballes* reconciling the dog sniff line of cases with *Kyllo* but then totally ignored it in its analysis, as does Jardines in his brief in opposition, provoking one to ask what do the Florida Supreme Court and Jardines think this paragraph means? BIO at 18. It was the dissent in *Caballes* that believed that "if constitutional scrutiny is in order for the imager" in *Kyllo*, then it was "in order for the dog" as well. *Caballes*, 543 U.S. at 413, n.3 (Souter, J., dissenting). The majority in *Caballes* rejected such an analogy. The Florida Supreme Court, by requiring probable cause before a narcotics dog is employed, basically followed the dissent in *Caballes*. *Caballes*, 543 U.S. at 417-425 (Ginsburg, J., dissenting). Florida's conformity clause prohibits the Florida Supreme Court from following

a dissent. Under Florida's constitution, the Florida Supreme Court must follow the majority.

Conflict with the federal circuit courts of appeals

Jardines also attempts to establish that there is no conflict between the Florida Supreme Court and the Eighth Circuit or the Seventh Circuit. BIO at 23. Jardines vainly attempts to distinguish the Eighth Circuit's decision in *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S.Ct. 964 (2011)(No. 10-7745), and the Seventh Circuit's decision in *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005). Neither *Scott* nor *Brock* are distinguishable.

Brock involved a dog sniff of a locked bedroom door, with a sign "stay out" on it, from inside the house. *Brock*, 417 F.3d at 693. While unclear, surely, Jardines is not attempting to assert that one has a lesser expectation of privacy in a bedroom than in a house. Brock argued just the opposite – that he had a heightened expectation of privacy in his bedroom. *Brock*, 417 F.3d at 695 (arguing that he has "a far greater privacy interest inside his home, particularly inside the bedroom," than in a public space or a car). Jardines asserts that *Brock* is distinguishable because the dog in

that case was legally present inside the house. The dog in *Brock* was legally inside the house because the officers obtained consent to enter the house from the defendant's roommate. But Franky was legally present on the front porch in this case as well. The Florida Supreme Court openly admitted that, under their precedent, there is no expectation of privacy on the front porch because "salesmen or visitors may appear at any time" on the porch. *Jardines v. State*, 2011 WL 1405080, *10 (Fla. 2011)(citing *State v. Morsman*, 394 So.2d 408, 409 (Fla. 1981). And that is this Court's view as well. *Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) (observing that when "officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). In all three cases, *Brock*, *Scott* and this case, the dog was legally present at the spot where the sniff was conducted. Moreover, the location of the dog when he sniffed was not the violation of the Fourth Amendment according to the Florida Supreme Court. Rather, the violation was that the dog was sniffing the front door of a private residence.

Scott involved a dog sniff of the front door of an apartment. Jardines attempts to distinguish between a private house and an apartment as did the Florida Supreme Court. *Jardines*, 2011 WL 1405080 at *3, n.3 (distinguishing a sniff of "an

apartment or other temporary dwelling" from a sniff of a "private residence."); BIO at 24 n.6. But this will not do. There is no difference between an apartment and a detached house for Fourth Amendment purposes. As this Court has observed, the "most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States v. Ross*, 456 U.S. 798, 822 (1982). Nor does the protection of the Fourth Amendment depend on whether the dwelling is temporary. *Minnesota v. Olson*, 495 U.S. 91 (1990)(holding that an overnight guest has a legitimate expectation of privacy in such temporary quarters); *Stoner v. California*, 376 U.S. 483, 490 (1964)(holding that a person who rents a hotel room has a legitimate expectation of privacy in such temporary quarters). The Florida Supreme Court's view of the Fourth Amendment as limited to houses rather than apartments and to permanent dwellings rather than temporary dwellings conflicts this Court's repeated holdings to the contrary. The State pointed out this error to the Florida Supreme Court in its motion for rehearing. This is simply another way, among the myriad of ways, that the Florida Supreme Court in *Jardines* violated this Court's precedent. And the Florida Supreme Court's mistaken view of the Fourth Amendment protection due apartments and

temporary dwellings is yet another reason to grant certiorari review of this case. There is conflict between the Florida Supreme Court's decision in this case and that of the Seventh Circuit in *Brock* as well as that of the Eighth Circuit in *Scott*.

Jardines states that there is not a single case holding "that a dog sniff conducted at the front door of a private residence does not constitute a Fourth Amendment search." BIO at 25. This is not an accurate statement of the caselaw. The Eighth Circuit's decision in *Scott* is a case holding that a dog sniff of the front door of a private residence is not a Fourth Amendment search. An apartment is a private residence. Furthermore, Jardines makes this statement and then cites *United States v. Byle*, 2011 WL 1983355 (M.D.Fla. 2011) with the signal cf. "But see" would be the correct signal. In *Byle*, a narcotics dog named Missy alerted on the mailbox of one private residence and then she alerted on the window of another private residence being used as a grow house. The district court denied the motion to suppress in which the defendant claimed a dog sniff of a house was a search citing *Jardines*. The district court disagreed with the Florida Supreme Court's legal analysis in *Jardines*, concluding that "the Supreme Court meant what it said—a dog sniff is not a search." *Byle*, 2011 WL 1983355 at *4. There are cases, from both federal circuits and

federal district courts, holding that a dog sniff of a private residence is not a search.

Independent source doctrine

Jardines also attempts to limit the Florida Supreme Court's holding regarding Detective Pedraja's smell being tainted by Franky alerting first to situations where the officer only approaches the front door to confirm the dog's alert. BIO at 28 n.7. The Florida Supreme Court, however, did not limit its holding in this manner. The Florida Supreme Court noted that the trial court stated in a footnote: "There was evidence that after the drug detection dog had alerted to the odor of a controlled substance, the officer also detected a smell of marijuana plants emanating from the front door. However, this information was only confirming what the detection dog had already revealed." *Jardines v. State*, 2011 WL 1405080, 18 (Fla. 2011). The Florida Supreme Court also discussed the Fourth District's observation in *State v. Rabb*, 920 So.2d 1175, 1191 (Fla. Ct. App. 2006), that "the chronology of the probable cause affidavit suggests that the dog alert to marijuana occurred prior to law enforcement's" and "we cannot assume that law enforcement detected the odor of marijuana before

the dog alerted." *Jardines*, 2011 WL 1405080 at *18.

While the Florida Supreme Court stated "the trial court had the opportunity to observe Detective Pedraja's testimony first-hand at the suppression hearing," the trial court's statement is not a credibility finding. Rather, it is a statement of chronology, as is the Fourth District's observation in *Rabb*. A statement that the "information was only confirming what the detection dog had already revealed" is a first-in-time statement. But under the independent source doctrine, chronology is not the focus. *Murray v. United States*, 487 U.S. 533, 542 (1988)(referring to a "later" lawful seizure that is genuinely independent of an "earlier" tainted one). Often, indeed, most of the time, the independent source of the information arises after the tainted first source as is the scenario in most inevitable discovery situations. The Florida Supreme Court improperly emphasized chronology rather than properly emphasizing whether the source was independent or dependent. Detective Pedraja's nose is independent of Franky's nose.

Furthermore, this Court has never limited its independent source doctrine or inevitable discovery doctrine to situations where the second source was not attempting to confirm the first source. *See generally Hudson v. Michigan*, 547

U.S. 586, 600-601 (2006)(plurality)(holding the exclusionary rule did not apply and discussing and comparing the case to *Segura v. United States*, 468 U.S. 796 (1984), where the only entry was warrantless to the present case "where the only entry was with a warrant" and concluding obtaining a search warrant "before going in must have at least this much effect"). Attempting to confirm with an independent means of confirmation, such as a human nose, is inherently an independent source. *See United States v. Byle*, 2011 WL 1983355, 4 (M.D.Fla. 2011)(concluding that the human officers' smell of marijuana by itself is sufficient to support the issuance of a warrant and that their testimony about the smell was not "the fruit of the poisonous tree" and provides probable cause even disregarding the positive alert by the dog).

II. Significance of the issue

This is a significant issue to the future of joint drug task forces. The Florida Supreme Court's decision undermines the cooperation between state and federal law enforcement that is necessary to enforce the nation's drug laws.

Jardines asserts the Florida Supreme Court's decision in this case lacks exceptional importance, relying on this Court's denial of

certiorari review in *State v. Rabb*, 920 So.2d 1175 (Fla. Ct. App 2006), *cert. denied, Florida v. Rabb*, 549 U.S. 1052 (2006) (No. 06-309). This assertion ignores the fact that *Rabb* was not a decision from a state court of last resort; *Rabb* was a decision from a state intermediate appellate court. This Court's rule concerning considerations governing review on certiorari, rule 10(b), refers to conflict created by "a state court of last resort." *Jardines*, in contrast to *Rabb*, is a decision from a state court of last resort. *Jardines* is a decision from the Florida Supreme Court, not an intermediate appellate court. This Court rarely grants review of decisions from state intermediate appellate courts in the expectation that the respective state's Supreme Court will resolve the matter correctly without the necessity of this Court's involvement. The Florida Supreme Court, however, did not resolve the matter correctly. Rather, the Florida Supreme Court joined the intermediate appellate court's erroneous view of the Fourth Amendment necessitating this Court's involvement. Additionally, this Court's rule speaks of an "important federal question," not of "exceptional" importance. S.Ct. rule 10(b). Whether the Fourth Amendment prohibits a dog sniff of the front door of a suspected grow house is an important federal question.

Moreover, contrary to Jardines' view, there have been significant developments in the law since *Rabb* was decided in 2006. BIO at 27. *Jardines* itself is a significant development in that a state supreme court refused to follow this Court's decision in *Caballes* – the first state supreme court to do so as a matter of Fourth Amendment law. Furthermore, the conflict between the Florida Supreme Court and the federal circuits did not exist until the Florida Supreme Court decided this case. Moreover, the Eighth Circuit has joined the fray since *Rabb*. *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S.Ct. 964 (2011)(No. 10-7745). *Scott* was issued in 2010. The legal landscape is not the same as it was five years ago.

Jardines also argues that the effect on law enforcement's ability to detect grow houses from the Florida Supreme Court's decision is overstated by Petitioner because human officers, "using their ordinary senses," can smell the scent of the marijuana coming from a grow house, while at the front door, and, then, obtain a search warrant based on that information. BIO at 27. The operators of grow houses, however, often tape the doors and windows to prevent the scent of marijuana from escaping. They also use items with strong scents, such as mothballs, to mask the smell

of the marijuana. *United States v. Phillips*, 496 F.2d 1395, 1398 (5th Cir. 1974)(explaining that mothballs are often used to mask the scent of marijuana). While these tactics often prevent a human officer from smelling the marijuana; they rarely prevent a trained narcotics dog, with their excellent sense of smell, from doing so. Jardines' argument limits law enforcement to the least effective method of detection rather than the most effective and guarantees that numerous grow houses will remain undetected.

The issues presented are not fact-bound. The Florida Supreme Court's decision in *Jardines* conflicts with this Court's views and the holdings of the federal circuits. The issues are significant to both state and federal law enforcement. And the decision in this case has ramifications far beyond Florida. Other states are adversely impacted by the Florida Supreme Court's decision. Texas filed an amicus curiae brief urging this Court to grant review which was joined by 17 other states and Guam. This Court should grant review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida
Tallahassee, Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
Charmaine M. Millsaps
Assistant Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
Carolyn.Snurkowski@myfloridalegal.com
Counsel for State of Florida
**Counsel of Record*

AMICUS CURIAE BRIEF

DEC - 5 2011
OFFICE OF THE CLERK

No. 11-564

In the Supreme Court of the United States

FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF OF TEXAS, ALABAMA, ARIZONA, COLORADO, DELAWARE, GUAM, HAWAII, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, NEBRASKA, NEW MEXICO, TENNESSEE, UTAH, VERMONT, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
[Tel.] (512) 936-0596
adam.aston@oag.state.tx.us

COUNSEL FOR AMICI CURIAE

[Additional counsel listed on inside cover]

ADDITIONAL COUNSEL

LUTHER STRANGE
Attorney General of Alabama

TOM HORNE
Attorney General of Arizona

JOHN W. SUTHERS
Attorney General of Colorado

JOSEPH R. BIDEN, III
Attorney General of Delaware

LEONARDO M. RAPADAS
Attorney General of Guam

DAVID M. LOUIE
Attorney General of Hawaii

LAWRENCE G. WASDEN
Attorney General of Idaho

ERIC J. TABOR
Attorney General of Iowa

DEREK SCHMIDT
Attorney General of Kansas

JACK CONWAY
Attorney General of Kentucky

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

BILL SCHUETTE
Attorney General of Michigan

JON BRUNING
Attorney General of Nebraska

GARY KING
Attorney General of New Mexico

ROBERT E. COOPER, JR.
Attorney General of Tennessee

MARK L. SHURTLEFF
Attorney General of Utah

WILLIAM H. SORRELL
Attorney General of Vermont

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

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INTEREST OF AMICI CURIAE[1]

All States have a keen interest in combating illegal drugs. Drug-detection dogs play a vital role in these efforts. Petitioner is correct that the Florida Supreme Court's decision jeopardizes the States' ability to use this crucial tool to discover illegal drugs prior to their distribution. Pet. 31–32. Amici States thus have a distinct interest in the correct disposition of this matter.

DISCUSSION

I. THE DECISION BELOW CONFLICTS WITH COURT PRECEDENT AND JEOPARDIZES A WIDELY USED METHOD OF DETECTING ILLEGAL DRUGS.

The Court has repeatedly held that the use of a detection dog to determine whether narcotics are present does not constitute a Fourth Amendment search. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (investigation of a vehicle during a traffic stop); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (investigation of a vehicle at a drug checkpoint); *United States v. Place*, 462 U.S. 696, 707 (1983) (investigation of a traveler's luggage). The Court explained that the use of detection dogs is "much less intrusive than a typical search" and that "no other investigative procedure . . . is so limited both in the manner in which the information is obtained and in the content of the information revealed." *Place*, 462 U.S. at 707; *see also Edmond*, 531 U.S. at 40 (noting that a dog sniff of a car

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1. Pursuant to Supreme Court Rule 37.2(a), amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4.

is "much less intrusive than a typical search") (citation omitted). Moreover, in criticizing one law enforcement agency's failure to use a detection dog, the Court explained that the practice is one that can *provide* the probable cause needed to justify an arrest, *Florida v. Royer*, 460 U.S. 491, 506 (1983), rather one that *requires* probable cause.[2]

Naturally, given the Court's clear guidance, state and federal officials routinely use drug-detection dogs during their investigations. For example, in Texas, the Department of Public Safety deploys more than 20 dog-handler teams across the State, and these teams routinely perform more than 1000 sniff tests annually.[3] Arizona's Department of Public Safety likewise deploys

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2. The Court has recognized that a law enforcement officer's sense of smell can provide probable cause supporting the issuance of a warrant. *United States v. Ventresca*, 380 U.S. 102, 111 (1965) ("A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists so as to allow issuance of a warrant."); *Johnson v. United States*, 333 U.S. 10, 12–13 (1948) (noting that a federal agent smelling the "distinctive" and "unmistakable" odor of burning opium may be sufficient probable cause to obtain a warrant and describing that evidence as likely "to be evidence of [the] most persuasive character"). A detection dog's sense of smell should be treated no differently under the Fourth Amendment.

3. *See, e.g.*, Texas Department of Public Safety, 2001 Annual Report at 11, *available at* http://www.txdps.state.tx.us/director_staff/public_information/annrep2001.pdf; Texas Department of Public Safety, 2002 Annual Report at 9–10, *available at* http://www.txdps.state.tx.us/director_staff/public_information/annrep2002.pdf.

more than 25 canine teams.[4] And in 2010, the Virginia State Police Department's 18 narcotic teams led to 118 arrests and 127 drug seizures.[5] Local law enforcement agencies also often deploy their own detection teams. And the States often coordinate with federal authorities, just as the local authorities did in this case.

The Drug Enforcement Administration (DEA) has established the Domestic Cannabis Eradication / Suppression Program (DCE/SP) to target marijuana cultivation nationwide.[6] In 2010, that program resulted in the eradication of more than 4,700 indoor grow sites in 46 States.[7] And the federal government routinely uses its own detection dogs during its investigations. In 2000, the Department of Justice issued a guide for selecting detection dogs. That report noted that the U.S. Customs Service alone had more than 600 canine teams in service. U.S. Department of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for Law Enforcement Applications

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4. *See* Canine Unit, http://www.azdps.gov/About/Organization/Highway_Patrol/Canine/.

5. Virginia State Police, Annual Report: 2010 Facts and Figures 46, *available at* http://www.vsp.state.va.us/Annual_Report.shtm.

6. Domestic Cannabis Eradication / Suppression Program, http://www.justice.gov/dea/programs/marijuana.htm.

7. 2010 Domestic Cannabis Eradication / Suppression Program Statistical Report, http://www.justice.gov/dea/programs/marijuana_seizure_results.pdf.

(2000) at 21.[8] The report also touted the success of the canine program, noting that in one year, 9,220 seizures of narcotics and other drugs (at an estimated value of $3.1 billion) were made as a result of detections by U.S. Customs Service canines. *Id.* at 22.

It is thus evident that the use of detection dogs has been a common practice for state and federal authorities for quite some time. The decision below substantially undermines these critical state and federal efforts.

As the certiorari petition demonstrates, the Florida Supreme Court's decision that the use of a detection dog is a Fourth Amendment search requiring probable cause is based upon its misapplication of *Caballes*, *Edmond*, *Place*, and *Kyllo v. United States*, 533 U.S. 27 (2000). Pet. 14–17. The Florida Supreme Court attempted to distinguish this Court's dog-sniff cases by stating that the "minimally intrusive" nature of the investigations in those cases does not apply to an investigation of a home. *Jardines v. State*, No. SC08-2101, 2011 WL 1405080, at *8 (Fla. Apr. 14, 2001). But an officer walking a detection dog up to the front porch of a home to determine what can be smelled in that area is not intrusive. After all, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also Florida v. Riley*, 488 U.S. 445, 449

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8. This report is available at http://ncjrs.gov/pdffiles1/nij/183260.pdf.

(1989) ("[T]he police may see what may be seen from a public vantage point where [they have] a right to be.") (internal quotation omitted). The officers were unquestionably permitted to approach the front door of Jardines's residence. *See Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) (noting that when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"). And while they were standing on the porch, the officers were unquestionably permitted to use their senses in an attempt to determine whether marijuana was being grown within the house. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(c), at 575–77(4th ed. 2004); *id.* at 575–77 n. 89–98 (collecting cases). This does not change merely because a detection dog also approached the front door.

The Florida Supreme Court is plainly incorrect that the sniff test conducted at Jardines's front door was a "vigorous and intensive" procedure, *Jardines*, 2011 WL 1405080, at *10, or an "intrusive procedure," *id.*, at *13. Contrary to that court's view, there was *no* intrusion during the front porch sniff test, much less a "substantial government intrusion into the sanctity of the home." *Id.* There was thus no basis for the Florida Supreme Court's refusal to follow *Caballes* and the Court's other dog-sniff cases. And as the certiorari petition demonstrates, the decision below is in sharp conflict with the circuit courts' post-*Caballes* decisions. Pet. 18–21.

If the Florida Supreme Court's decision stands, it could have a profound chilling effect on law-

enforcement efforts to combat illegal drugs. The Court should instead reverse the judgment below to ensure that detection dogs retain their proper place at the forefront of state and federal efforts against the production and distribution of illegal drugs.

II. THE FLORIDA SUPREME COURT'S "PUBLIC SPECTACLE" TEST FINDS NO SUPPORT IN THE COURT'S CASES AND CANNOT CONVERT THE USE OF A DETECTION DOG INTO A SEARCH.

In an attempt to bolster its dubious conclusion regarding detection dogs, the Florida Supreme Court stated that the circumstances surrounding the sniff test—which it called "a sustained and coordinated effort by various law enforcement departments"—contributed to the Fourth Amendment violation. *Jardines*, 2011 WL 1405080, at *12, *13. While Miami-Dade police officers conducted the sniff test, additional officers, joined by federal DEA agents, established a perimeter around the residence and assumed stand-by positions. *Id.*, at *10, *12. After the dog sniff produced a positive alert and Detective Pedraja independently smelled the marijuana, the perimeter and back-up officers remained in place (in public view) while a warrant was obtained. *Id.*, at *12.

Law enforcement officers maintaining a perimeter during an investigation of this sort serve dual purposes. First, they provide for the safety of their fellow officers and the general public. And second, they can help ensure that evidence is not removed or destroyed. It should go without saying that officers may remain in public view while they serve these functions; officers are permitted to "freeze" the situation while other

officers obtain a warrant. *See Illinois v. McArthur*, 531 U.S. 326, 337 (2001) (An officer's refusal to allow defendant to enter his trailer without a police officer until a search warrant was obtained did not violate the Fourth Amendment.); *Segura v. United States*, 468 U.S. 796, 798 (1984) (Officers may secure the premises to preserve the status quo while obtaining a warrant.). Instead, the Florida Supreme Court called this a "public spectacle," *Jardines*, 2011 WL 1405080, at *12, constituting a Fourth Amendment search because it might "expose the resident to public opprobrium, humiliation[,] and embarrassment," *id.*, at *13.

This new "public spectacle" test for determining whether probable cause and a warrant are required prior to the use of an investigation technique is unsupported by the Court's cases. Pet. 24–29. Notably, the Florida Supreme Court could not point to a single case in which this Court found that a search had occurred based on its determination of the mood of the person being investigated. Nor does the "public spectacle" test survive a common-sense inquiry. Any interaction with law enforcement authorities conducting an investigation into suspected criminal activity might well be unsettling for the suspect. Surely a suspect's potential unease cannot mean that warrants are required prior to commencing any investigation, but that is the implication of the decision below. The Florida Supreme Court's "public spectacle" inquiry was plainly erroneous, and its judgment relying on this analysis should be reversed.

III. THIS CASE MERITS SUMMARY REVERSAL.

Summary reversal is appropriate to "correct a clear misapprehension" of federal law, *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam), and when the decision below is "flatly contrary to this Court's controlling precedent," *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam). Amici States submit that this is just such a case. *See* SUP. CT. R. 16.1; EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 5.12(a), (c) (9th ed. 2007).

The Florida Supreme Court's decision is "flatly contrary" to a number of this Court's decisions holding that a dog sniff is not a search. The judgment below is not saved by the court's creation of a "public spectacle" test. Rather, that test finds no support in this Court's precedent. Reliance on the "public spectacle" test thus introduced further error.

Summary reversal would allow the Court to reaffirm that a detection dog is an appropriate tool for law enforcement officers to use to establish probable cause during their investigations while conserving the Court's scarce resources. This remedy is especially appropriate here, to ensure that other courts do not follow the Florida Supreme Court's defiance of *Caballes*.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Florida Supreme Court. Alternatively, the Court should grant the petition and set the case for briefing and oral argument.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
[Tel.] (512) 936-0596
adam.aston@oag.state.tx.us

December, 2011

COUNSEL FOR AMICI CURIAE

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-564

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2011

STATE OF FLORIDA,
Petitioner

vs.

JOELIS JARDINES.
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

Brief of Wayne County, Michigan as Amicus Curiae in Support of Petitioner

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

*TIMOTHY A. BAUGHMAN
Chief of Research, Training
And Appeals
1441 St. Antoine
Detroit, MI 48226
Phone: (313) 224-5792
E-Mail: tbaughma@co.wayne.mi.us

* Counsel of Record

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Question Presented

I.

Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties. Amicus has litigated cases involving the Fourth Amendment issue involved in the present case in the State courts, and the decision in this case will directly affect future prosecutions conducted by the office of Amicus.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Statement of the Case

Amicus joins the statement of the case of the Petitioner, the State of Florida.

Summary of Argument

The Fourth Amendment protects citizens against unreasonable searches of their "persons, houses, papers, and effects." While a search—as opposed to a "knowing exposure" or "misplaced confidence"—may be defined as a governmental invasion of a reasonable expectation of privacy held by the person who seeks to complain, to fall within the protections of the Fourth Amendment it must also concern that individual's "person, house, papers, or effects," as the "explicit language" of the Fourth Amendment "indicates with some precision *the places and things encompassed by its protections.*"

Put another way, the *Katz* decision did not sever the Fourth Amendment from its text. In a Fourth Amendment inquiry it must be ascertained 1)that there was a search; if so, 2)that the search concerned the "person, house, papers, or effects" of the person who seeks to complain; and if so, 3)whether, the search was reasonable. Here there was no search, as the dog sniff revealed "no information other than the location of a substance that no individual has any right to possess." Nor was Respondent's house invaded by the approach to his door. There was no trespass here, actual or virtual. Consequently, the Florida Supreme Court should be reversed.

Argument

I.

A dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is not a Fourth Amendment search requiring probable cause.

Katz established the new criterion, which is, is there an invasion of privacy? Does -- are you obtaining information that a person had a reasonable expectation to be kept private? I think that was wrong. I don't think that was the original meaning of the Fourth Amendment. But nonetheless it's been around for so long, we are not going to overrule that.[1]

A. Introduction: taking the text seriously

When considering the meaning and application of a legal text, it is wise to keep the actual text front-and-center, for when only the gloss upon the text is reviewed, it is too often forgotten that "[t]he seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate

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[1] Justice Scalia, oral argument transcript, *United States v Antoine Jones*, No. 10-1259, p. 6.

or end result is one that would never have been seriously considered in the first instance."[2] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Though much has changed since the adoption of the Bill of Rights, a wise member of an eminent court,[3] Justice James Campbell, observed long ago "[t]hat the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances."[4] Further, "[i]t is not competent for

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[2] *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 127, 93 S.Ct. 2665, 2668, 37 L.Ed 2d 500 (1973).

[3] The Michigan Supreme Court of Cooley, Campbell, Christiancy, and Graves, serving together between 1868 and 1875, and known as the "big four" of Michigan Supreme Court history.

[4] *People v Blodgett*, 13 Mich 127, 140 (1865)(Campbell, J.).

any department of the government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things."[5] As Justice Harlan put it almost a half century ago, "[i]t is no service to our constitutional liberties to encumber the particular provisions which safeguard them with a gloss for which neither the text nor history provides any support."[6]

The Fourth Amendment protects against "unreasonable searches"; the text so says. But does it protect against *every* governmental search? Should the Fourth Amendment be read as providing "The right of the People to be secure against unreasonable searches and seizures shall not be violated....," the phrase "in their persons, houses, papers, and effects" removed as surplusage, or do *all*[7] the words matter? And what is a search?

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[5] *People v Blodgett*, 13 Mich 127, 139 (1865)(Campbell, J.) (quoted by this Court on two occasions: *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 403, 57 S.Ct. 578, 587 (1937); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 451, 54 S.Ct. 231, 244 - 245 (1934)).

[6] *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 90, 84 S.Ct. 1594, 1624, 12 L.Ed 2d 678 (1964)(Harlan, J., concurring).

[7] See *Marbury v. Madison*, 1 Cranch. 137, 5 U.S. 137, 174, 2 L.Ed. 60 (1803): "It cannot be presumed that any clause in the constitution is intended to be without effect. . . . " And see *Lake County v. Rollins*, 130 U.S. 662, 670, 9 S.Ct. 651, 652, 32 L.Ed. 1060 (1889): "To get at the thought or

It has become canonical that "the Fourth Amendment protects people not places,"[8] and that a search must therefore be defined as an invasion of a "reasonable expectation of privacy" rather than being limited simply to a physical invasion of a place.[9] But is the *Katz* test one which defines that which the Constitution protects—reasonable expectations of privacy—or one which defines when a search occurs—when the Government invades a reasonable expectation of privacy—*with regard to that which the Constitution protects*; namely, "persons, houses, papers, or effects"? The difference is not simply one of semantics.

Amicus submits that it is not necessary to overrule *Katz* here, but that *Katz* should be viewed as establishing when a search has occurred, as opposed to a "knowing exposure"[10] or a revelation

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meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them."

[8] One noted commentator, Judge Moylan, has referred to Justice Stewart's phrase as "Seven hallucinogenic little words . . . ." Moylan & Sonsteng, "Fourth Amendment Applicability," 16 Wm. Mitchell L. Rev. 209, 219 (1990).

[9] *Katz v United States*, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967).

[10] *Katz*, 88 S.Ct. at 511.

through "misplaced confidence,"[11] neither of which invoke the Fourth Amendment. If the government *has* invaded a reasonable expectation of privacy held by the person who seeks to complain, then it must be asked whether that invasion concerned the "person, houses, papers, or effects" of that individual, and then, if so, whether it was reasonable. Here, Respondent's claim fails both the first two inquiries: there was no search, nor was there any invasion of the "house."

B. The Katz test defines that which constitutes a search, but does not hold that all searches are within the Fourth Amendment

In *Katz* the Government tape recorded (and overheard) Katz's end of telephone conversations through the use of an electronic device placed on a public telephone booth from which Katz was known to place long-distance calls. Neither Katz nor the other parties to the conversations had consented to this activity. The Court agreed to hear the case on Katz's petition raising the question whether the public telephone booth was a "constitutionally protected area," and, if so, whether a physical penetration of a constitutionally protected area was necessary in order for it to be said that a Fourth Amendment search had occurred.

The Government argued both that the place was not protected (the telephone booth), and that no search had occurred because there had been no

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[11] See e.g. *Hoffa v. United States*, 385 U.S. 293, 302, 87 S.Ct. 408, 413, 17 L.Ed. 2d 374 (1966).

physical penetration of the telephone booth; actually, both arguments were arguments that no search had occurred. As to whether the telephone booth was a "constitutionally protected area," the Government stressed that the telephone booth was "partially constructed of glass." This is an argument of a lack of a governmental invasion—that the subject has "knowingly exposed" himself to the public—so that no search had occurred. But as Justice Stewart pointed out, it was the uninvited ear, not the intruding eye, which Katz had sought to exclude. And on its face, the argument regarding a lack of physical penetration of the booth is an argument that no search occurred within the meaning of the Fourth Amendment.

In its opinion, the Court reformulated the issues. The Court began by flatly stating that the "Fourth Amendment cannot be translated into a general right of privacy,"[12] finding that formulation at once too narrow, in that the Fourth Amendment protection may on occasion have nothing to do with privacy, and too broad, in that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."[13] The Court concluded, however, that while what a person "knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection..., what he seeks to preserve as private, even in an area accessible to the public, may be

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[12] *Katz*, at 581.

[13] *Katz*, at 581.

constitutionally protected...."[14] The Court rejected the requirement that there be a "physical intrusion" in order to constitute a search, finding that doctrine inconsistent with its previously stated conclusion that the Fourth Amendment protects people, and not "areas."

The holding of the Court, rejecting the trespass doctrine, was an explicit finding that the Government's activities "violated the privacy upon which (Katz) justifiably relied while using the telephone booth *and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.*"[15] The Court then undertook to determine whether the search was reasonable, finding it was not. Thus, the innovation in the law in *Katz* was its definition of *that which constitutes a search.*

But it was Justice Harlan's concurring opinion which formulated the test which came to capture the field. While he agreed in principle that the Fourth Amendment protects people, he observed that the protection afforded people "requires reference to a place."[16] Justice Harlan's "reasonable expectation of privacy" test has since become the formula for when the Fourth Amendment is implicated--if the Government has invaded a reasonable expectation of privacy, then whether that conduct is reasonable is to be measured by Fourth Amendment standards. But it

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[14] *Katz*, at 582.

[15] *Katz*, at 582 (emphasis supplied)..

[16] *Katz*, at 587.

is appropriate to look beneath the formula to the words of the Constitution itself.[17] On its face, *Katz* defines *not* when the Fourth Amendment applies, but rather when a search occurs. In practice these two are generally viewed as synonymous, but the question of whether there has been a governmental search, and the question whether that search falls within Fourth Amendment protections, are separate, and *both* are necessary parts of the inquiry in any particular case.

The Fourth Amendment protection refers to searches and seizures of "persons, houses, papers, and effects." If there has been a search—if one has a reasonable expectation of privacy in the area or interest invaded—but the governmental invasion is not of the "person, house, papers, or effects" of that person, can it be said to be covered by the Fourth Amendment? If the entire test for whether the Fourth Amendment is involved is whether there has been an invasion of a reasonable expectation of

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[17] See Nagel, "The Formulaic Constitution," 84 Mich L Rev 165, 182 (1985): "...judicial decisions are an effort to approximate a standard external to the opinion itself. Although all types of doctrine have the natural effect of substituting themselves for primary constitutional meaning, formulaic explanations are especially incompatible with maintaining the authority of the original text....The Justice who argued that the 'minimum scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection' was struggling against the dead weight of words to get back to the Constitution" (footnotes omitted).

privacy, without regard to whether that expectation of privacy is related to the core privacy values associated with an individual's person, house, papers, or effects—if, in fact, answering whether a search has occurred leads directly to asking whether it was reasonable—is the Fourth Amendment not then translated into the protection of a general right of privacy disavowed in *Katz*, at least all privacy that is reasonably expected *and* that society recognizes as justifiable? Failing to consider the language of the Fourth Amendment itself—persons, houses, papers, and effects—skips a step, and rewrites the Fourth Amendment.[18]

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[18] This is not to say that *Katz* reach the wrong result. To invade a reasonable expectation of privacy in speech through the sort of electronic interception employed in that case should be considered a search of the person. It is no leap to find that among the protections of the *person* from unreasonable search and seizure is a protection of the unreasonable seizure of private speech. In all cases there are three steps to be taken, not two: not 1)was there a search, and 2)if so, was it reasonable, but 1)was there a search, 2)if so, was it a search involving the core privacy values associated with those privacy interests protected by the Fourth Amendment—the person, houses, papers or effects of an individual; and 3)if so, was it reasonable? And see Moylan, supra, at 220-223.

C. The Katz "reasonable expectation of privacy" standard did not sever Fourth Amendment doctrine from the Amendment's language; the Fourth Amendment protects "persons, houses, papers, and effects" from unreasonable searches and seizures

In *Oliver v United States*[19] narcotics agents of the Kentucky State Police received reports that marijuana was being grown on Oliver's farm, and proceeded to investigate. They encountered a locked gate with a "No Trespassing" sign, and followed a footpath around the gate. Over a mile from Oliver's home they discovered a field of marijuana. Because of the sign, and because the field was bounded on all sides by woods and embankments and could not be seen from any public access, the trial court found a violation of the Fourth Amendment in the warrantless entry on the property leading to the field, only to be reversed by the circuit court. This Court then took up the issue.

Writing for the Court Justice Powell turned to the "explicit language" of the Fourth Amendment itself, which "indicates with some precision *the places and things encompassed by its protections.*"[20] Finding that the open fields did not come within the "house" of Oliver, the Court cited Justice

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[19] *Oliver v United States*, 466 US 170, 80 L Ed 2d 214, 104 S Ct 1735 (1984).

[20] *Oliver*, at 222 (emphasis added).

Holmes statement in *Hester v United States*[21] that "The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[22] And plainly the open fields are not "effects," which encompass personal property and not realty. In response to the dissent, Justice Powell observed that "Katz' 'reasonable expectation of privacy' standard *did not sever Fourth Amendment doctrine from the Amendment's language*."[23] While the Court found *Katz* itself faithful to the language of the Fourth Amendment without at the same time "wedding itself to an *unreasonable* literalism,"[24] it viewed the position of the dissent as going beyond disapproval of an unreasonable literalism, instead ignoring the language of the Constitution completely.

Katz, then, has been cabined by *Oliver*, which simply makes clear that the text of the Fourth Amendment--"persons, houses, papers, and effects"—matters.

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[21] *Hester v United States*, 265 US 57, 68 L Ed 898, 44 S Ct 445 (1924).

[22] *Oliver*, at 222.

[23] *Oliver*, at 222-223 (fn 6) (emphasis supplied).

[24] *Oliver*, at 222-223 (fn 6) (emphasis supplied).

D. A dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is neither a search nor a trespass into the "house"

Kyllo v United States[25] and *Illinois v Caballes*[26] are central to the inquiry here. Danny Kyllo was suspected of growing marijuana in his residence, a process that requires high-intensity lamps. Agents employed an "Agema Thermovision 210" thermal imaging device to scan the premises. These devices detect infrared radiation, and convert them into images based on relative warmth (black is cool, white is hot, shades of gray indicate relative differences). The device was employed from the agents' vehicle across the street from the residence, and also from the street in the back of the house. It revealed that the roof over the garage and a side wall of the residence were relatively hot and substantially warmer than neighboring homes. From the readings, the agents concluded that Kyllo was using halide lights to grow marijuana in the house (as he in fact was). This information, along with other information, was detailed in an affidavit to obtain a search warrant for the premises.

This Court rejected the idea that the use of the device was not a "search" because all it revealed was heat radiating from the external surface of the house, observing that a powerful directional

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[25] *Kyllo v United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

[26] *Illinois v Caballes*, 543 US 405, 125 S Ct 834, 160 L Ed 2d 842 (2005).

microphone also picks up only sound emanating from a house, and yet all would agree its use to overhear conversations in the home would, in the absence of a warrant, be unlawful.[27] The Court concluded that where the government "uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is 'a search' and is presumptively unreasonable without a warrant."[28]

In other words, to use the approach taken by Justice Campbell almost a century and a half ago, the Court did *not* hold that the Fourth Amendment means something other than it did when it was adopted, but regarded it "as meant to apply to the present state of things as well as to all other past or future circumstances." With modern technology, *virtual trespasses* are now possible, allowing, as it were, a "remote" invasion of a reasonable expectation of privacy held *within the home* of the person who seeks to complain. When this is to occur, said the Court, a warrant is needed, founded on probable cause.

But that use of a dog trained to sniff out marijuana is not comparable to use of a thermal-imaging device is made plain in *Illinois Caballes*, for the reason that the dog sniffs reveal nothing other than the "presence of absence of a contraband item," something in which no one has a reasonable expectation of privacy--nor is the use of the sense of smell of a dog a "device" not available to general

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[27] *Kyllo*, 121 S Ct at 2044.

[28] *Kyllo*, 121 S Ct at 2046.

public use.[29] The case involved a dog sniff of an automobile, and the Court noted that in *United States v Place*[30] it had treated a "canine sniff by a well-trained narcotics-detection dog as 'sui generis' because it 'discloses only the presence or absence of narcotics, a contraband item."[31] The use of such a dog, then, is not a search because it "does not expose noncontraband items that otherwise would

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[29] It is not use of a device at all, and the use of the remarkable sense of smell of dogs dates back centuries. See dissenting opinion in *State v. Juarez-Godinez*, 900 P.2d 1044, 1056 (Or.App.,1995), overruled *State v Smith*, 963 P.2d 642 (Or., 1998): ". . . in the ancient Greek epic, *The Odyssey,* written in approximately 700 B.C., Homer describes the return of Odysseus to his home and family. Because Odysseus is disguised as a beggar, no one recognizes him except Argos, his devoted tracking hound. *See also Cynegeticus* (Greek treatise on hunting and dogs authored by Xenophone between 430 and 370 B.C.). In England and in this country from its earliest days, there is literature about the use of dogs to find objects and people by detecting the odor left behind when the object or the person was no longer discernible by humans. *See generally* 1 *Wigmore on Evidence* § 177 (3d ed 1940); J.C. McWhorter, *The Bloodhound as a Witness,* 54 Am L Rev 109, 114 (1920). . . ."

[30] *United States v Place*, 462 US 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

[31] *Caballes*, 125 S Ct at 838.

remain hidden from public view."[32] The Court specifically addressed *Kyllo*, finding it distinguishable *precisely* because the device there was "capable of detecting lawful activity" whereas the dog sniff revealed "no information other than the location of a substance that no individual has any right to possess...."[33]

1. No search occurred here through either the "sniff," as there was no invasion of a reasonable expectation of privacy, given that only contraband could be "sniffed"

Does the use of a trained drug-detection dog at the front door of premises—a sniff that "does not expose noncontraband items that otherwise would remain hidden from public view"—constitute a search because of the place employed; that is, at the *threshold* of a home rather than the outside of an automobile? The Florida Supreme Court answered this question incorrectly, and should be reversed, for neither a search, nor a virtual trespass into the home, occurred here.

The search-warrant application affidavit here included that a trained dog had "alerted" for the presence of marijuana at the front door of Jardines's residence. The Florida Supreme Court found that the use of the drug-detecting dog was itself a warrantless search in violation of the

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[32] *Caballes*, 125 S Ct at 838 (quoting *Place*). The opinion was joined by the author of *Kyllo*, Justice Scalia.

[33] *Caballes*, at 838.

Fourth Amendment, based largely on *Kyllo*.[34] That court found *Place* distinguishable not because the investigative method employed differed, as it did not, but because of the *location* of its employment—a dwelling rather than upon luggage at an airport. This analysis is both question-begging (where the issue is whether a search occurred, to resolve it on the ground that the "search" crossed the threshold begs the question), and factually inaccurate (the dog's sense of smell hardly crosses the threshold; rather, the odor of marijuana escapes the threshold, to be noticed by the dog). And its transformation of an investigative technique described as *not a search* by this Court because, given that it "does not expose noncontraband items that otherwise would remain hidden from public view," it invades no expectation of privacy that society will recognize as reasonable, into a search because of the *place* employed, renders the Fourth Amendment nonsensical.[35] Either a sniff by a trained dog is a search or it is not (and in this case no invasion of the house occurred in the placement of the dog). And other cases reject the notion that *Kyllo* requires the conclusion that it is the place employed rather than

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[34] *Jardines v State*, 73 So.2d 34, 44 ff (2011).

[35] See Comment, "State V. Rabb: Dog Sniffs Close to Home," 80 St. John's L. Rev. 1123, 1133 (Summer 2006)(stating that "The Rabb court incorrectly read Kyllo as evidence that Place and its progeny concern location," and taking the position that *Rabb* was wrong in both rationale and result).

the technique that governs whether a search has occurred.

The point was considered in *United States v Brock*.[36] As in the present case, a trained drug-sniffing dog alerted to the presence of contraband from outside the door to premises (a locked bedroom occupied by Brock in the residence of another person), and that information was employed in an affidavit to obtain a search warrant. The court found *Caballes* rather than *Kyllo* controlling precisely because the technique employed does not somehow transmogrify based on the location where it is employed, even though employed in the same manner.

> *Kyllo* does not support defendant's position. The *Kyllo* Court did reaffirm the important privacy interest in one's home....However, as the Court subsequently explained in *Caballes*, it was essential to *Kyllo*'s holding that the imaging device was capable of detecting not only illegal activity inside the home, but also lawful activity including such intimate details as "at what hour each night the lady of the house takes her daily sauna and bath."...the dog sniff inside Brock's residence was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any

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[36] *United States v Brock*, 417 F3d 692 (CA 7, 2005).

> information about lawful activity over which Brock had a legitimate expectation of privacy.[37]

To much the same effect is the Maryland Supreme Court's decision in *Fitzgerald v State*.[38] Again, a trained dog was used and detected the odor of marijuana outside Fitzgerald's apartment door, and this information was used in the affidavit to a search warrant. The court reviewed the *Place* decision and remarked that from the language employed in that opinion "it is possible to view the Court's holding either as narrowly directed at airplane luggage or as a general categorization of canine sniffs as non-searches. Subsequent Supreme Court decisions make clear that the Court has adopted the latter view."[39] The question does not turn on the location of the dog sniff, said the court, except "to determine whether the dog and officer's presence there was constitutional,"[40] a matter at

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[37] *Brock*, at 696.

[38] *Fitzgerald v State*, 864 A2d 1006 (Maryland, 2004). The court affirmed the decision of the Maryland Court of Appeals, *Fitzgerald v State*, 837 A2d 989 (Md App, 2002), written by Judge Charles Moylan. As is always the case with opinions of Judge Moylan, its analysis is very helpful on the question here.

[39] *Fitzgerald*, at 1010.

[40] *Fitzgerald*, at 1010.

issue in none of these cases, including the present case.

To the argument that *Kyllo* mandates a different result the court gave the back of its hand: "Even a perfunctory reading of *Kyllo* reveals that its standard does not apply to dog sniffs."[41] And, consistent with the analysis of the *Brock* case, discussed above, the court found that "*Kyllo's* concern with thermal imagers' scope and potential revelation of intimate private details fits neatly with *Place's* rationale that dog sniffs are unique in their narrow yes/no determination of the presence of narcotic. A person does not have a legitimate expectation of privacy in contraband, but does in bath water. A dog that can determine contraband's existence and nothing else is not a search, even when sniffing the exterior of a home."[42]

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[41] *Fitzgerald*, at 1015.

[42] *Fitzgerald*, at 1016.

See also *United States v Coyler*, 878 F2d 469 (CA DC, 1989); *United States v Reed*, 141 F3d 644, 649-650 (CA 6, 1998)("...a person has no legitimate privacy interest in the possession of contraband, thus rendering the location of the contraband irrelevant to the [Supreme Court's holding in *Place*] that a canine sniff does not constitute a search"); *Rodriguez v. State*, 106 SW3d 224 (Tex App, 2003); *People v Jones*, 279 Mich.App 86, 93, 755 N.W.2d 224 (2008) ("[A] canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused").

2. No trespass into Respondent's house, either actual or virtual, occurred here

Nor was there any trespass, virtual or actual, into Respondent's home here in order to achieve the "sniff." The police handler walked the dog up the porch, and the dog alerted to marijuana at the Respondent's front door. Though the officer was on Respondent's property, no trespass, "technical" or otherwise, occurred. The Fourth Amendment does not disable the police from doing that which any ordinary citizen could lawfully do. As Professor LaFave has said:

> It is not objectionable for an officer to come upon that part of the property which "has been opened to public common use." The route which any visitor to a residence would use is not private in the Fourth Amendment sense, and thus if police take that route "for the purpose of making a general inquiry" or for some other legitimate reason, they are "free to keep their eyes open," and thus it is permissible for them to look into a garage or similar structure from that location. On the other hand, if the police depart from that route and go to other, more private parts of the curtilage in order to look into a structure there, this constitutes a search, even if the police might have been able to (but didn't) make the

same observation from outside the curtilage.[43]

And so entries onto property of residences such as walkways, driveways, carports, and the like, and, as here, porches, have been held not to constitute intrusions under the Fourth Amendment.[44]

The sniff of the dog, then, did not constitute a search, nor did walking onto the porch with the dog.

E. Conclusion: the Florida Supreme Court should be reversed

Concerning what he called those "[s]even hallucinogenic little words"--"the Fourth Amendment protects people not places"—Judge Moylan remarked that "[s]tanding alone, they appeared unnerving and many courts went berserk under their intoxicating influence. A closer reading of Katz, however, should have dispelled the alarm."[45] This is such a case. The police entry onto that part of Respondent's property which was "opened to public common use" of those who wished to make inquiry within was not objectionable under the Fourth Amendment. The sniff of the dog was

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[43] LaFave, *Search and Seizure* (4th Ed), § 2.3(f). (footnotes omitted).

[44] LaFave, supra, see cases at fn 213 through 217. And see *People v Houze*, 425 Mich. 82, 387 N.W.2d 807 (1986).

[45] Moylan, supra, at 219.

not a search, as it did "not expose noncontraband items that otherwise would remain hidden from public view." There was neither a search under the Fourth Amendment—an invasion of a reasonable expectation of privacy held by the person who seeks to complain—nor any cognizable intrusion concerning Respondent's "person, house, papers, or effects." By taking the text seriously—"persons, houses, papers, and effects"—the Court may and should avoid a quagmire of privacy questions that are not within the Fourth Amendment, but belong instead to the People's elected political representatives, with difficult and competing interests involved.[46]

The Fourth Amendment was not violated here, and the Florida Supreme Court should be reversed.

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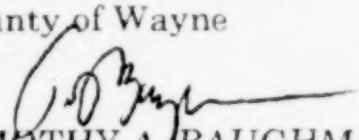
[46] "Why isn't this precisely the kind of a problem that you should rely upon legislatures to take care of?" Justice Scalia, oral argument transcript, *United States v Antoine Jones*, No. 10-1259, p. 51 (discussing nonconsensual placement of GPS locating devices on automobiles).

Relief

Wherefore, the Petitioner submits that the Florida Supreme Court Should be reversed.

Respectfully submitted,

Kym L. Worthy
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief, Research, Training, and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

JOINT APPENDIX

RECORD
AND
BRIEFS

APR 2 2 2013

No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES

On Writ of Certiorari
to the Supreme Court of Florida

JOINT APPENDIX

Carolyn M. Snurkowski*
Associate Deputy
Attorney General
carolyn.snurkowski
@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney
General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: 850-414-3300

Howard K. Blumberg*
Assistant Public
Defender
hblumberg
@pdmiami.com
1320 N.W. 14th Street
Miami, Florida 33125
Telephone:
305-545-1958

**Counsel of Record*

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Miami-Dade County Circuit Court Order Granting Defendant's Motion to Suppress Items Seized From His House, June 13, 2007..... A-204 – A-206

Transcript of June 14, 2007 hearing.. A-207– A-213

CASE NUMBER: 132006CF0408390001XX [F06040839]

FILE DATE: 12/06/2006

COUNTY: Miami-Dade

CASE TYPE: FELONY

STATUS: OPEN

CHARGE SEQ#: 00001

STATUTE: 893.135(1)(A)

STATUTE TEXT: CANNABIS/TRAFFICKING

DATE: 01/12/2007

PHASE: Prosecutor: Filed

CHARGE SEQ#: 00002

STATUTE: 812.014(2)(C)

STATUTE TEXT: GRAND THEFT 3RD DEGREE

DATE: 01/12/2007

PHASE: Prosecutor: Filed

[DEFENDANT ATTORNEY=ZENOBI, EUGENE F STATE ATTORNEY=CONKLIN, JENNIE T DEFENDANT=JARDINES, JOELIS A]

[JUDGE=JUDGE NOT ASSIGNED,]

LAST DOCKET DATE=12/21/2011

SEQ NO	ACTION DATE	TEXT
00284	01/11/2012	MOTION FOR EXTENSION OF TIME FILED 00/00/0000 SET FOR 01/18/2012 AT 09:20
00282	12/21/2011	MOTION TO/FOR: MTN FOR ORDER EXTENDING PERIOD OF TIME
00264	12/21/2011	REPORT RE: STATUS SET FOR 01/26/2012 AT 09:06
00281	12/16/2011	MOTION TO/FOR: ORDER EXTENDING PERIOD OF TIME ESTABLISHED BY FLORIDA RULE OF...
00280	12/16/2011	NOTICE OF HEARING 12/21/11
00279	12/16/2011	REPORT RE: (BY) STATE SET FOR 12/21/2011 AT 09:00

00277	10/14/2011	ROR AMT/ 0 ISSUED 10/14/2011 POWER/
00276	10/12/2011	ORDER: PLEADING FILED IN CASE F10028300C
00275	10/11/2011	REPORT RE: (BY) SHERIFF SET FOR 10/12/2011 AT 09:20
00274	09/08/2011	ORDER: EXTENDING PERIOD OF TIME ESTABLISHED BY FRCP 3.191 FOR TRIAL
00273	09/07/2011	REPORT RE: MANDATE SET FOR 09/08/2011 AT 09:00
00272	09/07/2011	REPORT RE: (BY) STATE SET FOR 09/08/2011 AT 09:00
00271	09/02/2011	REOPEN MANDATE
00270	09/02/2011	MANDATE/REVERSED DCA/#3D07-1615 SEE ATTACHED OPINION

00269	09/02/2011	D C A ORDER TO RELINQUISH JURISDICTION - TRIAL COURT REMANDED WITH DIRECTIONS- #3D07-1615- (SEE ATTACHED OPN.)
00267	08/31/2011	REPORT RE: (BY) STATE SET FOR 09/07/2011 AT 09:20
00266	08/29/2011	MOTION TO/FOR: FOR ORDER EXTENDING PERIOD OF TIME EST. BY FRCRP 3.191 FOR T RIAL
00265	08/01/2011	MOTION FOR CONTINUANCE FILED 08/01/2011 ORAL SET FOR 08/01/2011 AT 10:21 GRANTED DEFS
00263	07/25/2011	SUPREME COURT ORDER RE: PROCEEDINGS IN COURT , D.C.A. & CIR CT IN & FOR DADE COUNTY

00260	07/04/2011	E-SUBPOENA: BARTELT, DOUGLAS ID: 030-04444 FOR: TRIAL ON 08/01/2011 AT 09:07 ISSUED BY: CJIS SENT: 07/04/2011 RECD/NOTFD: 07/04/2011 ACKN: 07/04/2011 S
00259	07/04/2011	E-SUBPOENA: DONNELLY, KEVIN ID: 030-03876 FOR: TRIAL ON 08/01/2011 AT 09:07 ISSUED BY: CJIS SENT: 07/04/2011 RECD/NOTFD: 07/04/2011 ACKN: 07/04/2011 S
00258	07/04/2011	E-SUBPOENA: RAMIREZ, JOSE ID: 030-01270 FOR: TRIAL ON 08/01/2011 AT 09:07 ISSUED BY: CJIS SENT: 07/04/2011 RECD/NOTFD: 07/04/2011 ACKN: 07/04/2011 S

00257	07/04/2011	E-SUBPOENA: PEDRAJA, WILLIAM ID: 030-01268 FOR: TRIAL ON 08/01/2011 AT 09:07 ISSUED BY: CJIS SENT: 07/04/2011 RECD/NOTFD: 07/04/2011 ACKN: 07/05/2011 S
00256	05/05/2011	TRIAL HEARING SCHEDULED FOR 08/01/2011 AT 09:07 TRIAL HEARING RESET
00255	05/05/2011	MOTION FOR CONTINUANCE FILED 05/05/2011 ORAL SET FOR 05/05/2011 AT 10:24 GRANTED DEFS
00253	04/18/2011	E-SUBPOENA: BARTELT, DOUGLAS ID: 030-04444 FOR: TRIAL ON 05/16/2011 AT 09:07 ISSUED BY: CJIS SENT: 04/18/2011 RECD/NOTFD: 04/18/2011 ACKN: 04/18/2011 S

00252	04/18/2011	E-SUBPOENA: DONNELLY, KEVIN ID: 030-03876 FOR: TRIAL ON 05/16/2011 AT 09:07 ISSUED BY: CJIS SENT: 04/18/2011 RECD/NOTFD: 04/18/2011 ACKN: 04/18/2011 S
00251	04/18/2011	E-SUBPOENA: RAMIREZ, JOSE ID: 030-01270 FOR: TRIAL ON 05/16/2011 AT 09:07 ISSUED BY: CJIS SENT: 04/18/2011 RECD/NOTFD: 04/18/2011 ACKN: 04/25/2011 S
00250	04/18/2011	E-SUBPOENA: PEDRAJA, WILLIAM ID: 030-01268 FOR: TRIAL ON 05/16/2011 AT 09:07 ISSUED BY: CJIS SENT: 04/18/2011 RECD/NOTFD: 04/18/2011 ACKN: 04/18/2011 S

00248	03/03/2011	TRIAL HEARING SCHEDULED FOR 05/16/2011 AT 09:07 TRIAL HEARING RESET
00247	03/03/2011	MOTION FOR CONTINUANCE FILED 03/03/2011 ORAL SET FOR 03/03/2011 AT 12:43 GRANTED STIP
00246	03/03/2011	REPORT RE: PLEA/SOUNDING SET FOR 05/05/2011 AT 09:17
00244	02/14/2011	E-SUBPOENA: BARTELT, DOUGLAS ID: 030- 04444 FOR: TRIAL ON 03/14/2011 AT 09:07 ISSUED BY: CJIS SENT: 02/14/2011 RECD/NOTFD: 02/14/2011 ACKN: 02/14/2011 S

00243	02/14/2011	E-SUBPOENA: DONNELLY, KEVIN ID: 030-03876 FOR: TRIAL ON 03/14/2011 AT 09:07 ISSUED BY: CJIS SENT: 02/14/2011 RECD/NOTFD: 02/14/2011 ACKN: 02/14/2011 S
00242	02/14/2011	E-SUBPOENA: RAMIREZ, JOSE ID: 030-01270 FOR: TRIAL ON 03/14/2011 AT 09:07 ISSUED BY: CJIS SENT: 02/14/2011 RECD/NOTFD: 02/14/2011 ACKN: 02/14/2011 S
00241	02/14/2011	E-SUBPOENA: PEDRAJA, WILLIAM ID: 030-01268 FOR: TRIAL ON 03/14/2011 AT 09:07 ISSUED BY: CJIS SENT: 02/14/2011 RECD/NOTFD: 02/14/2011 ACKN: 02/14/2011 S

00238	02/01/2011	REPORT RE: PLEA/SOUNDING SET FOR 03/03/2011 AT 09:17
00239	01/10/2011	MOTION FOR CONTINUANCE FILED 01/10/2011 ORAL SET FOR 01/10/2011 AT 10:42 GRANTED PROS
00237	01/10/2011	TRIAL HEARING SCHEDULED FOR 03/14/2011 AT 09:07 TRIAL HEARING RESET
00236	01/07/2011	TRIAL UNIT ASSIGNED: FELONY DIVISION 13
00235	01/07/2011	TRIAL PROS. ASSIGNED: CONKLIN, JENNIE T
00234	01/03/2011	MEMO RE: APPOINTMENT AS PRIVATE COURT APPOINTED COUNSEL JOSEPH GEORGE, JR
00231	12/28/2010	ORDER APPOINTING REGIONAL COUNSEL
00230	12/28/2010	DEFENSE ATTY PDEF/PEREIRA, EDUARDO X

00227	12/23/2010	MOTION TO WITHDRAW & CERTIFICATION OF CONFLICT OF INTEREST
00226	12/23/2010	REPORT REGIONAL COUNSEL ACCEPTANCE SET FOR 12/28/2010 AT 09:30
00225	12/23/2010	REPORT RE: CONFLICT OF INTEREST SET FOR 12/28/2010 AT 09:30
00223	12/13/2010	E-SUBPOENA: BARTELT, DOUGLAS ID: 030-04444 FOR: TRIAL ON 01/10/2011 AT 09:04 ISSUED BY: CJIS SENT: 12/13/2010 RECD/NOTFD: 12/13/2010 ACKN: 12/13/2010 S
00222	12/13/2010	E-SUBPOENA: DONNELLY, KEVIN ID: 030-03876 FOR: TRIAL ON 01/10/2011 AT 09:04 ISSUED BY: CJIS SENT: 12/13/2010 RECD/NOTFD: 12/13/2010 ACKN: 12/13/2010 S

00221	12/13/2010	E-SUBPOENA: RAMIREZ, JOSE ID: 030-01270 FOR: TRIAL ON 01/10/2011 AT 09:04 ISSUED BY: CJIS SENT: 12/13/2010 RECD/NOTFD: 12/13/2010 ACKN: 12/13/2010 S
00220	12/13/2010	E-SUBPOENA: PEDRAJA, WILLIAM ID: 030-01268 FOR: TRIAL ON 01/10/2011 AT 09:04 ISSUED BY: CJIS SENT: 12/13/2010 RECD/NOTFD: 12/13/2010 ACKN: 12/13/2010 S
00219	11/30/2010	TRIAL PROS. ASSIGNED: ZELEDON, AILEEN
00218	11/02/2010	DEFENSE ATTY PDEF/SANCHEZ, LAZARO R
00217	11/02/2010	TRIAL PROS. ASSIGNED: KIRSH, ROY
00216	10/29/2010	TRIAL HEARING SCHEDULED FOR 01/10/2011 AT 09:04

00214	10/28/2010	REPORT RE: TRIAL DATE SET FOR 10/29/2010 AT 09:30
00211	10/21/2010	ARRAIGNMENT HEARING SCHEDULED FOR 10/28/2010 AT 09:00
00210	10/20/2010	ARRAIGNMENT HEARING SCHEDULED FOR 10/21/2010 AT 09:00
00209	10/20/2010	DESCRIPTION ASSESSED PAID BALANCE PUB DEFEND A 50.00 0.00 50.00 TOTAL: 50.00 0.00 50.00 LAST ASSESSED: 10/20/2010 LAST PAYMENT: 00/00/0000
00208	10/04/2010	TRIAL PROS. ASSIGNED: JOHNSON, CHRISTINA
00206	09/30/2010	ARRAIGNMENT HEARING SCHEDULED FOR 10/20/2010 AT 09:00
00205	09/30/2010	ROR AMT/ 0 REVOKED 09/30/2010 POWER/
00204	09/29/2010	REPORT RE: BOND REVIEW SET FOR 09/30/2010 AT 09:00

00199	06/11/2010	TRIAL PROS. ASSIGNED: LOPEZ, ALEJANDRA L
00198	06/07/2010	NOTICE OF HEARING 6/4/10 9:30 AM
00197	06/04/2010	MOTION FOR CONTINUANCE FILED 06/04/2010 ORAL SET FOR 06/04/2010 AT 11:50 GRANTED DEFS
00196	06/04/2010	REPORT RE: APPEAL SET FOR 09/22/2010 AT 09:00
00195	06/04/2010	REPORT RE: STATUS SET FOR 09/22/2010 AT 09:00
00194	06/03/2010	REPORT RE: STATUS SET FOR 06/04/2010 AT 09:00
00189	04/15/2010	REPORT RE: APPEAL SET FOR 05/20/2010 AT 09:00
00188	04/15/2010	REPORT RE: STATUS SET FOR 05/20/2010 AT 09:00
00187	04/12/2010	DEFENSE ATTY PDEF/HOLDEN, MONICA

00184	03/16/2010	REPORT RE: APPEAL SET FOR 04/15/2010 AT 09:00
00183	03/16/2010	REPORT RE: STATUS SET FOR 04/15/2010 AT 09:00
00180	02/04/2010	DEFENSE ATTY PDEF/SMITH, BRENDAN P
00179	12/17/2009	REPORT RE: APPEAL SET FOR 03/16/2010 AT 09:00
00178	12/17/2009	REPORT RE: STATUS SET FOR 03/16/2010 AT 09:00
00177	12/16/2009	REPORT RE: APPEAL SET FOR 12/17/2009 AT 09:00
00176	12/16/2009	REPORT RE: STATUS SET FOR 12/17/2009 AT 09:00
00175	12/15/2009	TRIAL UNIT ASSIGNED: FELONY DIVISION 08
00174	12/15/2009	TRIAL PROS. ASSIGNED: ASA, DIVISION
00171	09/24/2009	TRIAL UNIT ASSIGNED: NARCOTICS

00170	09/24/2009	TRIAL PROS. ASSIGNED: KAHN, DAVID
00169	09/18/2009	REPORT RE: APPEAL SET FOR 12/16/2009 AT 09:00
00168	09/18/2009	REPORT RE: STATUS SET FOR 12/16/2009 AT 09:00
00167	09/11/2009	DEFENSE ATTY PDEF/PATEL, KASHYAP P
00164	08/17/2009	DEFENSE ATTY PDEF/STERN, ALEX
00163	06/19/2009	REPORT RE: APPEAL SET FOR 09/18/2009 AT 09:00
00162	06/19/2009	REPORT RE: STATUS SET FOR 09/18/2009 AT 09:00
00159	04/20/2009	REPORT RE: PLEA SET FOR 06/19/2009 AT 09:00
00158	04/17/2009	REPORT RE: PLEA SET FOR 04/20/2009 AT 09:00
00157	04/17/2009	ARRAIGNMENT HEARING SCHEDULED FOR 04/20/2009 AT 09:00

00156	04/15/2009	REPORT RE: PLEA SET FOR 04/17/2009 AT 09:00
00155	04/15/2009	ARRAIGNMENT HEARING SCHEDULED FOR 04/17/2009 AT 09:00
00154	04/13/2009	REPORT RE: PLEA SET FOR 04/15/2009 AT 09:00
00153	04/13/2009	ARRAIGNMENT HEARING SCHEDULED FOR 04/15/2009 AT 09:00
00150	04/07/2009	REPORT RE: PLEA SET FOR 04/13/2009 AT 09:00
00149	04/07/2009	ARRAIGNMENT HEARING SCHEDULED FOR 04/13/2009 AT 09:00
00146	01/21/2009	REPORT RE: PLEA SET FOR 04/07/2009 AT 09:00
00145	01/21/2009	ARRAIGNMENT HEARING SCHEDULED FOR 04/07/2009 AT 09:00
00144	01/21/2009	DISCHARGE CERTIFICATE ISSUED AC06017815

00143	01/21/2009	DISCHARGE CERTIFICATE ISSUED AA06529181
00142	01/20/2009	ROR AMT/ 0 ISSUED 01/20/2009 POWER/
00141	01/20/2009	ROR AMT/ 0 DISCHARGED 01/20/2009 POWER/
00140	01/20/2009	RSC AMT/ 25000 DISCHARGED 01/20/2009 POWER/AC06017815
00139	01/20/2009	RSC AMT/ 5000 DISCHARGED 01/20/2009 POWER/AA06529181
00138	01/20/2009	MOTION FOR ROR OR CUSTODY RELEASE FILED 01/20/2009 ORAL SET FOR 01/20/2009 AT 13:42 GRANTED
00137	01/20/2009	REPORT RE: PLEA SET FOR 01/21/2009 AT 09:00
00136	01/20/2009	ARRAIGNMENT HEARING SCHEDULED FOR 01/21/2009 AT 09:00
00135	01/20/2009	DEFENSE ATTY PDEF/GONZALEZ, DIANA E

00132	01/15/2009	REPORT RE: TRIAL DATE SET FOR 01/20/2009 AT 09:00
00131	01/15/2009	ARRAIGNMENT HEARING SCHEDULED FOR 01/20/2009 AT 09:00
00128	01/06/2009	REPORT RE: PLEA SET FOR 01/15/2009 AT 09:00
00127	01/06/2009	ARRAIGNMENT HEARING SCHEDULED FOR 01/15/2009 AT 09:00
00123	12/18/2008	REPORT RE: PLEA SET FOR 01/06/2009 AT 09:00
00121	12/17/2008	REPORT RE: BOND REVIEW SET FOR 12/18/2008 AT 09:00
00120	12/11/2008	LETTER FROM:- IN THE DISTRICT COURT OF APPEAL OF FLORIDA COPY
00119	12/10/2008	D C A ORDER RE: MOTION FOR STAY OF MANDATE GRANTED #3D07-1615
00117	10/27/2008	LETTER FROM:- OPINION (COPY)

00115	08/14/2008	REPORT RE: APPEAL SET FOR 11/14/2008 AT 09:00
00113	04/16/2008	REPORT RE: APPEAL SET FOR 08/14/2008 AT 09:00
00111	02/06/2008	ALTERNATE JUDGE SCHWARTZ, ALAN
00110	02/06/2008	REPORT RE: TRANSCRIPT SET FOR 02/08/2008 AT 11:00
00109	01/29/2008	SUMMONS RE: TRANSCRIPT BRYNN DOCKSTADER
00108	01/29/2008	SUMMONS RE: TRANSCRIPT OFFICIAL REPORTING SERVICES, INC.
00107	01/29/2008	SUMMONS RE: TRANSCRIPT HOWARD BLUMBERG
00106	01/29/2008	SUMMONS RE: TRANSCRIPT RICHARD POLIN
00105	01/27/2008	LETTER FROM:- COPY OF DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

00104	01/18/2008	SUPPLEMENTAL RECORD ON APPEAL TRANSMITTED TO APPELLATE COURT DCA/#3D07-1615/ 2 VOLUMES
00103	01/17/2008	REPORT RE: APPEAL SET FOR 04/16/2008 AT 09:00
00102	01/16/2008	REPORT RE: APPEAL SET FOR 01/18/2008 AT 09:00
00101	01/16/2008	PREPARATION OF RECORD ON APPEAL DCA/#3D07-1615/ 2 VOLUMES
00100	01/10/2008	D C A ORDER RE: CAUSE REMANDED TRIAL COURT DETERMINE STATUS OF TRANSCRIPTS #3D07-1615
00096	01/10/2008	TRANSCRIPT OF PROCEEDING (ORIGINAL) JUNE 8, 2007
00095	01/09/2008	DESIGNATION TO COURT REPORTER AMENDED

00093	11/15/2007	DESIGNATION TO COURT REPORTER AMENDED
00092	10/26/2007	DEFENSE ATTY PDEF/STEINBERG, BRETT
00091	10/24/2007	RECORD ON APPEAL TRANSMITTED TO APPELLATE COURT DCA/#3D07-1615/ 1 VOLUME
00090	10/23/2007	PREPARATION OF RECORD ON APPEAL DCA/#3D07-1615/ 1 VOLUME
00089	10/19/2007	REPORT RE: APPEAL SET FOR 01/17/2008 AT 09:00
00087	09/19/2007	TRANSCRIPT OF COURT HEARING JUNE 14, 2007
00086	09/19/2007	TRANSCRIPT OF COURT HEARING JUNE 13, 2007
00085	08/30/2007	TRIAL PROS. ASSIGNED: WARFMAN, SCOTT L
00084	08/30/2007	TRIAL UNIT ASSIGNED: FELONY DIVISION 08
00083	08/30/2007	TRIAL PROS. ASSIGNED: ASA, DIVISION

00082	08/20/2007	TRIAL HEARING SCHEDULED FOR 10/19/2007 AT 09:00 TRIAL HEARING RESET
00081	08/20/2007	MOTION FOR CONTINUANCE FILED 08/20/2007 ORAL SET FOR 08/20/2007 AT 15:03 GRANTED CRT
00079	07/02/2007	APPELLATE COURT CASE NUMBER DCA/#3D07-1615
00078	06/27/2007	DIRECTIONS TO CLERK
00077	06/27/2007	STATEMENT OF JUDICIAL ACTS AND DESIGNATIONS TO CRT REPORTER
00076	06/27/2007	RECORD ON APPEAL DUE DATE - 08/13/2007
00075	06/27/2007	NOTICE OF APPEAL TRANSMITTED TO DCA
00074	06/25/2007	NOTICE OF APPEAL STATE/MOTION TO SUPPRESS BOOK 25732 PAGE 3581
00072	06/25/2007	TRIAL UNIT ASSIGNED: NARCOTICS

00071	06/22/2007	TRIAL PROS. ASSIGNED: GRIGGS, MARCUS B
00070	06/20/2007	DEPOSITION OF: OFFICER WILLIAM PEDRAJA
00069	06/20/2007	TRIAL HEARING SCHEDULED FOR 08/20/2007 AT 09:00 TRIAL HEARING RESET
00068	06/15/2007	EVIDENCE SUBMIT DATE 6/15/2007
00067	06/14/2007	LETTER FROM:- C. ZAHRALBAN, ASA
00066	06/14/2007	LETTER FROM:- C. ZAHRALBAN, ASA
00064	06/14/2007	TRIAL HEARING SCHEDULED FOR 06/20/2007 AT 09:00 TRIAL HEARING RESET
00061	06/13/2007	MOTION TO SUPPRESS FILED 06/13/2007 SET FOR 06/14/2007 AT 09:43 GRANTED
00060	06/13/2007	TRIAL HEARING SCHEDULED FOR 06/14/2007 AT 09:00

00059	06/08/2007	DEPOSITION OF: OFC DOUGLAS BARTELT
00058	06/08/2007	EXHIBIT LIST
00057	06/08/2007	TRIAL HEARING SCHEDULED FOR 06/13/2007 AT 09:00 TRIAL HEARING RESET
00056	06/08/2007	MOTION TO SUPPRESS FILED 06/08/2007 SET FOR 06/13/2007 AT 11:19 CONTINUED
00055	06/06/2007	MOTION TO/FOR: CONTINUANCE
00052	06/06/2007	MOTION CONTINUANCE (STATE) FILED 06/06/2007 SET FOR 06/06/2007 AT 12:10 NO RULING
00051	06/06/2007	TRIAL HEARING SCHEDULED FOR 06/08/2007 AT 09:00
00050	06/06/2007	MOTION TO SUPPRESS FILED 06/06/2007 SET FOR 06/08/2007 AT 14:27 CONTINUED
00054	06/05/2007	MOTION TO/FOR: SUPPRESS STATEMENTS & PHYSICAL EVIDENCE

00053	06/05/2007	NOTICE OF HEARING
00049	06/05/2007	TRIAL HEARING SCHEDULED FOR 06/06/2007 AT 10:30
00048	06/04/2007	DEFENSE WITNESS LIST
00047	06/04/2007	TRIAL HEARING SCHEDULED FOR 06/05/2007 AT 09:00
00046	05/24/2007	NOTICE OF TAKING DEPOSITION
00045	05/15/2007	NOTICE OF TAKING DEPOSITION
00043	05/14/2007	TRIAL HEARING SCHEDULED FOR 06/04/2007 AT 09:00 TRIAL HEARING RESET
00042	05/14/2007	MOTION FOR CONTINUANCE FILED 05/14/2007 ORAL SET FOR 05/14/2007 AT 11:18 GRANTED DEFS
00041	05/09/2007	NOTICE OF TAKING DEPOSITION
00040	05/08/2007	MEMO FROM STATE ATTORNEY / PUBLIC DEFENDER

00039	05/02/2007	NOTICE OF TAKING DEPOSITION
00037	04/03/2007	MOTION FOR CONTINUANCE
00036	04/03/2007	NOTICE OF HEARING 4/2/07 AT 9:00 AM CTR 2-3
00035	04/02/2007	TRIAL HEARING SCHEDULED FOR 05/14/2007 AT 09:00 TRIAL HEARING RESET
00034	04/02/2007	MOTION FOR CONTINUANCE FILED 04/02/2007 ORAL SET FOR 04/02/2007 AT 15:25 GRANTED DEFS
00033	03/28/2007	TRIAL PROS. ASSIGNED: GONZALEZ, IVETTE
00030	02/20/2007	MOTION FOR CONTINUANCE
00029	02/20/2007	NOTICE OF HEARING
00028	02/20/2007	TRIAL HEARING SCHEDULED FOR 04/02/2007 AT 09:00 TRIAL HEARING RESET

00027	02/20/2007	MOTION FOR CONTINUANCE FILED 02/20/2007 ORAL SET FOR 02/20/2007 AT 15:12 GRANTED STIP
00026	02/05/2007	DEFENSE ATTY PDEF/STEFEL, SHARI
00023	01/22/2007	DEFENSE ATTY PDEF/PUBLIC DEFENDER APPOINTMENT, AS
00022	01/12/2007	TRIAL HEARING SCHEDULED FOR 02/20/2007 AT 09:00
00021	01/12/2007	00001 F/ 893.135(1)(A)1 CANN/TRF/25-2000LBS DISP/ MODIFIED/REMOVED
00020	01/12/2007	INFORMATION FILED
00019	01/11/2007	INTAKE UNIT ASSIGNED: FELONY DIVISION 09
00018	01/10/2007	INTAKE UNIT ASSIGNED: REVIEW WEINSTEIN
00016	01/04/2007	ROR AMT/ 0 ISSUED 01/04/2007 POWER/

00015	01/04/2007	ARRAIGNMENT HEARING SCHEDULED FOR 01/12/2007 AT 09:00
00013	12/26/2006	ARRAIGNMENT HEARING SCHEDULED FOR 01/04/2007 AT 09:00
00024	12/15/2006	AFFIDAVIT FOR SEARCH WARRANT, SEARCH WARRANT & RETURN
00010	12/08/2006	RSC AMT/ 25000 ISSUED 12/06/2006 POWER/AC06017815
00009	12/07/2006	TRIAL UNIT ASSIGNED: FELONY DIVISION 08
00008	12/07/2006	TRIAL PROS. ASSIGNED: BOWLING, LYSIA
00007	12/07/2006	INTAKE PROS. ASSIGNED: BOWLING, LYSIA
00012	12/06/2006	BOND RECEIVED AC06017815
00011	12/06/2006	BOND RECEIVED AA06529181
00005	12/06/2006	RSC AMT/ 5000 ISSUED 12/06/2006 POWER/AA06529181

00002	12/05/2006	INVALID ADDRESS OVERRIDE PURSUANT TO BOOKING
00001	12/05/2006	ARRAIGNMENT HEARING SCHEDULED FOR 12/26/2006 AT 09:00

Florida Third District Court of Appeal
Docket

Case Docket

Case Number: 3D07-1615

Final Criminal State Appeals Notice from
Dade County

THE STATE OF FLORIDA, vs. JOELIS
JARDINES,

Lower Tribunal Case(s): 06-40839

06/27/2007 Notice of Appeal Filed. Filed By Bill Mc Collum

10/24/2007 Received Records. Notes: 1 volume.

11/21/2007 Mot. for Extension of time to file Initial Brief. Filed By Bill Mc Collum

11/26/2007 Clerk's notice granting eot (CLKEX). Date Due: 12/21/2007

12/26/2007 Mot. for Extension of time to file Initial Brief

12/27/2007 Clerk's notice granting eot (CLKEX). Date Due: 01/20/2008

01/07/2008 Miscellaneous Motion. Notes: for order to show cause

01/09/2008 Remand for Transcript Status (OG16D). Date Due: 01/29/2008

01/15/2008 Status Report. Notes: AA Bill Mc Collum

01/18/2008 Received Records. Notes: 2 volume.

02/08/2008 Motion To File Supplemental Record. Filed By Rolando A. Soler 0684775

02/08/2008 Supplemental Records. Filed By Rolando A. Soler 0684775

02/08/2008 Initial Brief on Merits. Filed By Bill Mc Collum

02/22/2008 Mot to Supplement Rec w/attachment Granted (OG13). Notes: The State of Florida's February 8, 2008 motion to supplement the record is granted, and the record on appeal is supplemented as stated in said motion.

02/26/2008 Mot. for Extension of time to file Answer Brief. Filed By Howard K. Blumberg 264385

02/28/2008 Clerk's notice granting eot (CLKEX). Date Due: 04/04/2008

03/25/2008 Appellee's Answer Brief. Filed By Howard K. Blumberg 264385

03/25/2008 Request for Oral Argument. Notes: AE Howard K. Blumberg 264385

04/01/2008 Notice of Oral Argument. Filed By Howard K. Blumberg 264385

04/09/2008 Notice of Oral Argument. Notes: AA Rolando A. Soler 0684775

04/28/2008 Miscellaneous Motion. Filed By Howard K. Blumberg 264385. Notes: mot for leave to file supplemental brief

04/28/2008 Oral Argument Date Set. Notes: 3rd DCA

04/30/2008 Miscellaneous Motion Granted (OG999). Date Due: 05/15/2008. Notes: Appellee's motion for leave to file a supplemental brief is granted to and including May 15, 2008, after which

the State shall have fifteen (15) days to file its supplemental brief.

05/15/2008 Supplemental Appellee's Answer Brief. Filed By Howard K. Blumberg 264385

05/23/2008 Initial Brief on Merits. Notes: SUPPLEMENTAL BRIEF

08/22/2008 Notice of Supplemental Authority. Filed By Howard K. Blumberg 264385

10/20/2008 Notice of Supplemental Authority. Filed By Rolando A. Soler 0684775

10/22/2008 Reversed - Authored Opinion

10/28/2008 Motion To Stay Issuance of Mandate. Filed By Howard K. Blumberg 264385

10/28/2008 NOTICE OF DISCRETN. JURISDICTN. Filed By NOTICE OF DISCRETN. JURISDICTN

11/05/2008 Order Response: Motion (OR23). Date Due: 11/15/2008

11/12/2008 RESPONSE. Filed By Bill Mc Collum. Notes: to motion for stay of mandate

11/21/2008 Withhold Issuance of Mandated Granted (OG57B)

02/06/2009 Record due to Supreme Court. Filed By NOTICE OF DISCRETN. JURISDICTN. Notes: on or before April 6, 2009

05/27/2009 West Publishing

07/22/2011 Supreme Court Disposition. Filed By NOTICE OF DISCRETN. JURISDICTN. Notes: rs motion for stay the mandate of proceeding is hereby granted in part and proceedings in this court, in the Third District Court of appeal and in the Circuit court of the Eleventh Judicial Circuit in and for Dade County, Florida are hereby stayed only to and including August 19, 2011, to allow rs to seek review in the Supreme Court of the United States and obtain any futher stay form that court.

08/26/2011 Supreme Court Mandate. Filed By NOTICE OF DISCRETN. JURISDICTN

08/31/2011 DCA Mandate Pursuant to S.Ct. (SC05)

08/31/2011 Mandate

10/17/2011 Returned Records. Notes: 3 VOLUMES.

Florida Supreme Court Docket

Case Docket

Case Number: SC08-2101 - Closed

JOELIS JARDINES vs. STATE OF FLORIDA

Lower Tribunal Case(s): 3D07-1615

11/03/2008 NOTICE-DISCRETIONARY JURIS (CERT DIRECT CONFLICT). Filed By PT Joelis Jardines BY: PT Howard Keith Blumberg 264385

11/07/2008 JURIS INITIAL BRIEF. Filed By PT Joelis Jardines BY: PT Howard Keith Blumberg 264385. Notes: W/APPENDIX (O&5 AND E-MAIL)

11/10/2008 No Fee - Insolvent. Notes: INSOLVENT BELOW

12/01/2008 JURIS ANSWER BRIEF. Filed By RS State Of Florida STATE BY: WE Rolando Antonio Soler 684775. Notes: O&5 & E-MAIL

02/04/2009 ORDER-JURIS ACCEPT/BRIEF SCHED (OA LATER DATE). The Court accepts jurisdiction of this case. Oral argument will be set by separate order. Counsel for the parties will be

notified of the oral argument date approximately sixty days prior to oral argument. Petitioner's initial brief on the merits shall be served on or before March 2, 2009; respondent's answer brief on the merits shall be served twenty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits shall be served twenty days after service of respondent's answer brief on the merits. Please file an original and seven copies of all briefs. The Clerk of the Third District Court of Appeal shall file the original record which shall be properly indexed and paginated on or before April 6, 2009. The record shall include the briefs filed in the district court separately indexed.

02/24/2009 MOTION-EXT OF TIME (INITIAL BRIEF-MERITS). Filed By PT Joelis Jardines BY: PT Howard Keith Blumberg 264385

02/26/2009 ORDER-EXT OF TIME GR (INITIAL BRIEF-MERITS). Notes: Petitioner's motion for extension of time is granted and petitioner is allowed to and including April 1, 2009, in which to serve the initial brief on the merits.

03/11/2009 MOTION-AMICUS CURIAE. Filed By MR Police K-9 Magazine BY: MR Arthur T. Daus, Iii 892688

04/02/2009 INITIAL BRIEF-MERITS. Filed By PT Joelis Jardines BY: PT Howard Keith Blumberg 264385. W/APPENDIX (O&7 & E-MAIL)

04/02/2009 RECORD/TRANSCRIPT. Filed By Hon. Mary Cay Blanks, Clerk D3 BY: Hon. Mary Cay Blanks, Clerk D3. Notes: CONSISTING OF 4 VOLUMES OF RECORD & 1 VOLUME CERT.COPIES APPEAL PAPERS

04/13/2009 ORDER-AMICUS CURIAE GR. Notes: The motion for leave to file a joint brief as amicus curiae filed by Police K-9 Magazine and Canine Development Group is hereby granted and they are allowed to file joint brief only in support of respondent. The joint brief by the above referenced amicus curiae shall be served pursuant to Florida Rule of Appellate Procedure 9.370(c). Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

04/16/2009 MOTION-EXT OF TIME (ANSWER BRIEF-MERITS). Filed By RS State Of Florida STATE BY: WE Rolando Antonio Soler 684775.

04/20/2009 ORDER-EXT OF TIME GR (ANSWER BRIEF-MERITS). Notes: Respondent's motion for

extension of time is granted and respondent is allowed to and including May 27, 2009, in which to serve the answer brief on the merits.

05/29/2009 ANSWER BRIEF-MERITS. Filed By RS State Of Florida STATE BY: WE Rolando Antonio Soler 684775. Notes: O&7 & E-MAIL (NO SOA) REQ'D AMD BRIEF

06/02/2009 AMICUS CURIAE ANSWER BRIEF-MERITS. Filed By MR Canine Development Group BY: MR Arthur T. Daus, Iii 892688. Notes: O&7 & E-MAIL (NO DATE OF SERVICE ON CERT.OF SERVICE PAGE)

06/02/2009 ORDER-OA SCHED (PREV ACCEPTED). Notes: The Court previously accepted jurisdiction. The Court will hear oral argument at 9:00 a.m., Tuesday, September 1, 2009. A maximum of twenty minutes to the side is allowed for the argument, but counsel is expected to use only so much of that time as is necessary. NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

06/02/2009 ORAL ARGUMENT CALENDAR

06/03/2009 CERTIFICATE OF SERVICE (AMD). Notes: MR Police K-9 Magazine BY: MR Arthur T. Daus, Iii 892688

06/05/2009 ORDER-BRIEF STRICKEN (NON-COMPLIANCE). Notes: Respondent's answer brief on the merits, which was filed with this Court on May 29, 2009, does not comply with Florida Rule of Appellate Procedure 9.210 and is hereby stricken. Respondent is hereby directed, on or before June 25, 2009, to serve an original and seven copies of an amended answer brief on the merits with a Summary of the Argument and does not exceed fifty pages in length. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all briefs in an electronic format as required by the provisions of that order.

06/12/2009 ANSWER AMD BRIEF-MERITS. Filed By RS State Of Florida STATE BY: WE Rolando Antonio Soler 684775. Notes: O&7 & E-MAIL

07/01/2009 REPLY BRIEF-MERITS. Filed By PT Joelis Jardines BY: PT Howard Keith Blumberg 264385. Notes: O&7 & E-MAIL

08/07/2009 NOTICE-SUPPLEMENTAL AUTHORITY. Filed By RS State Of Florida STATE BY: WE Rolando Antonio Soler 684775. Notes: O&7

09/01/2009 ORAL ARGUMENT HELD

04/14/2011 DISP-QUASHED. Notes: "We have said that the Fourth Amendment draws 'a firm line at the entrance to the house.' That line, we think, must be not only firm but also bright-which requires clear specification of those methods of surveillance that require a warrant." Kyllo, 533 U.S. at 40 (citation omitted) (quoting Payton, 445 U.S. at 590). Given the special status accorded a citizen's home in Anglo-American jurisprudence, we hold that the warrantless "sniff test" that was conducted at the front door of the residence in the present case was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment. We quash the decision in Jardines and approve the result in Rabb.

04/29/2011 MOTION-REHEARING. Filed By RS State Of Florida STATE BY: RS Charmaine Millsaps 989134. Notes: (RC)

04/29/2011 NOTICE-COUNS SUBSTITUTION. Filed By RS State Of Florida STATE BY: RS Charmaine Millsaps 989134. Notes: BY CHARMAINE M. MILLSAPS FOR ROLANDO SOLER

05/16/2011 NOTICE-SUPPLEMENTAL AUTHORITY. Filed By RS State Of Florida STATE BY: RS Charmaine Millsaps 989134. Notes: O&7

07/07/2011 DISP-REHEARING DY IN LIGHT OF REVISED OPINION. Notes: In light of the revised opinion, the Respondent's Motion for Rehearing is hereby denied. No Motion for Rehearing will be allowed. (RC)

07/15/2011 MOTION-STAY (USSC APPLICATION REVIEW). Filed By RS State Of Florida STATE BY: RS Charmaine Millsaps 989134. Notes: FILED AS "MOTION TO STAY MANDATE"

07/19/2011 ORDER-STAY PROCEEDINGS USSC GR. Notes: Respondent's Motion for Stay the Mandate of proceeding is hereby granted in part and proceedings in this Court, in the Third District Court of Appeal and in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida are hereby stayed only to and including August 19, 2011, to allow respondent to seek review in the Supreme Court of the United States and obtain any further stay from that court. (RC)

08/23/2011 MANDATE. Notes: CC: COUNSEL

08/23/2011 RECORD/TRANSCRIPT RETURNED. Filed By Hon. Mary Cay Blanks, Clerk D3 BY: Hon. Mary Cay Blanks, Clerk D3. Notes: 4 VOLUMES RECORD

08/31/2011 ARCHIVES. Notes: File

10/05/2011USSC ORDER GR EXT OF TIME. Filed By 11-564. Notes: EXTENDED TO 10/27/2011 (ORDER REC'D 10/10/2011)

10/26/2011 USSC CERTIORARI. Filed By 11-564

IN THE
COUNTY COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA

STATE OF FLORIDA)
)SS
COUNTY OF MIAMI-DADE)

AFFIDAVIT FOR SEARCH WARRANT

Before me, *George Sarduy*, a Judge of the County Court of the Eleventh Judicial Circuit of Florida, personally appeared William Pedraja, Miami-Dade Police Department, Badge #1268, who being by me first duly sworn, deposes and says that he has probable cause to believe and does believe that at the premises described as: 13005 SW 257 Terrace, there being a single story structure. The structure is the first structure west of SW 130 Avenue and is on the north side of SW 257 Terrace. The structure is green in color, with beige trim and a grey colored roof. The entry door of the residence to be searched is located on the south wall of the structure, faces south, and is white in color. The numerals 13005 are displayed on the south wall of the structure.

The Premises being in Miami-Dade County, Florida, Hereinafter referred to as "The Premises," The laws of the State of Florida are being violated therein, to wit: Possession of a Controlled Substance, as prohibited by Section 893.13 Florida

Statutes, such violation of the law as evidenced by a quantity of controlled substance, to wit: marijuana, and/or currency, exhaust fans/vents,

Affiant's Initials __/s/__

Judge's Initials __/s/__

carbon dioxide cylinders; window air conditioners, sun circles, solar tracks, reflective light hoods, high pressure sodium vapor bulbs, ballasts, grow mediums, feeder reservoirs, titles, receipts and any other documents and records evidencing illegal activity, or that would lead to the identification of persons responsible for the unlawful possession or distribution of controlled substances hereinafter referred to as "The Property."

"Your Affiant" has been with the Miami-Dade Police Department for 17 years and has been trained in the identification of narcotics and dangerous drugs by the Southeast Florida Institute of Criminal Justice. "Your Affiant" has attended narcotics identification schools sponsored by the Miami-Dade Police Department Training Bureau. "Your Affiant" has actively participated in the execution of many narcotics related search warrants and arrests wherein quantities of narcotics have been seized. More specifically, "Your Affiant" has participated in numerous marijuana hydroponic laboratory investigations. "Your Affiant" has interviewed numerous persons arrested on narcotics charges and viewed many forms of narcotics, consisting of, but not limited to, cocaine, crack cocaine, heroin, ecstasy, and marijuana cultivated through traditional and hydroponic methods. "Your Affiants" training and experience has made him familiar with the manner, in which narcotics are prepared,

distributed, stored and sold in the South Florida area. "Your Affiant" has reason to believe, and does believe that narcotics, to wit: marijuana is being cultivated and/or stored at "The Premises" in violation of F.S.S. 893.13.

Based on "Your Affiant's" training and experience, persons cultivating marijuana indoors often

Affiant's Initials __/s/__

Judge's Initials __/s/__

use the items identified in the description of "The Property" above for this purpose. Through this training and experience, "Your Affiant" has determined that marijuana cultivators use similar methods to cultivate marijuana in an urban environment (i.e. house/apartment). For example, in order to conceal their illegal activities, marijuana cultivators have to grow the marijuana inside a house or apartment. Consequently, they have to use artificial lighting apparatus to simulate natural sunlight in order to propagate the marijuana plants. The inside use of this type of lighting and accompanying insulated reflectors generate tremendous heat that has to be controlled by the usage of one or more air conditioning units. The recycling of the air conditioning unit maintains the climate within the house but also may result in the odor of marijuana being discharged outside of the home via cooling vents, windows and/or doors. In "Your Affiants" training and experience, marijuana (especially live marijuana plants) has a very distinct odor or scent. Therefore, persons cultivating Marijuana attempt to seal outside vents, board up windows and/or doors in order to prevent the odor or scent of marijuana from emanating outside of the structure or the plants to be seen from the common area.

"Your Affiant's" reasons for the belief that "The Premises" is being used as aforesaid and that

"The Property" listed above is being concealed and stored at "The Premises" is as follows:

On November 3, 2006, "Your Affiant" Detective William Pedraja, #1268, received information from a crime stoppers tip that marijuana was being grown at the described residence.

On December 5, 2006, "Your Affiant" conducted surveillance at the residence and observed no

Affiant's Initials __/s/__

Judge's Initials __/s/__

vehicles in the driveway. "Your Affiant" also observed windows with the blinds closed. "Your Affiant" and Detective Doug Bartelt with K-9 drug detection dog "FRANKY" approached "The Premises" in an attempt to obtain a consent to search. While at front door, "Your Affiant" detected the smell of live marijuana plants emanating from the front door of "The Premises." The scent of live marijuana is a unique and distinctive odor unlike any other odor. Additionally, K-9 drug detection dog "FRANKY" did alert to the odor of one of the controlled substances he is trained to detect. "Your Affiant," in an attempt to obtain a written consent to search, knocked on the front door of "The Premises" without a response. "Your Affiant" also heard an air conditioning unit on the west side of the residence continuously running without recycling. The combination of these factors is indicative of marijuana cultivation.

Based upon the positive alert by narcotics detector dog "FRANKY" to the odor of one or more of the controlled substances that she is trained to detect and "FRANKY" substantial training, certification, and past reliability in the field in detecting those controlled substances, it is reasonable to believe that one or more of those controlled substances are present within the area alerted to by "FRANKY." Narcotics Canine handler, Detective Bartelt, Badge number 4444, has been a police officer with the Miami-Dade

Police Department for nine years. He has been assigned to the Narcotics Bureau for six years and has been a canine handler since May 2004. In the period of time he has been with the Department, he has participated in over six hundred controlled substances searches. He has attended the following training and received certification as a canine

Affiant's Initials __/s/__

Judge's Initials __/s/__

handler:

1) Miami-Dade Police Department, Metropolitan Police Institute, Canine Narcotics Detection Course, (40 Hours) April, 2004.

2) Miami-Dade Police Department, Narcotics Bureau, Narcotics Detector Canine Training, May 28, 2004 through July 28, 2004.

3) International Forensic Research Institute, Florida International University, Narcotics Detection Team Certification, July 2004.

4) Miami-Dade Police Department, Metropolitan Police Institute, Canine Narcotics Detection Course, (40 Hours) April, 2005

5) International Forensic Research Institute, Florida International University, Narcotics Detection Team Certification, July 2005.

6) Fort Lauderdale Police Department and the Police K-9 Training Institute, Narcotics and Explosive K-9 Training Seminar, (32 Hours) June 2005

7) International Forensic Research Institute, Florida International University, Narcotics Detection Team Certification, February 2006.

8) Miami-Dade Police Department, Narcotics Bureau, weekly maintenance training.

Affiant's Initials __/s/__

Judge's Initials __/s/__

Since becoming a team, Detective Bartelt and narcotics detector canine "FRANKY" have received weekly maintenance training in accordance with established Miami-Dade Police Department procedures, including controlled negative testing and distracter training, as well as continuing training in basic and advanced search techniques. Narcotics detector canine "FRANKY" is trained to detect the odor of narcotics emanating from the following controlled substances to wit: marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy. Upon detection of the odor of any of these controlled substances, "FRANKY" is trained to sit at the source of the odor, and will exhibit a noticeable change in behavior. The canine's change in behavior indicates that he has detected the odor of one or more of the controlled substances he is trained to detect. To date, narcotics detector canine "FRANKY" has worked approximately 656 narcotics detection tasks in the field. He has positively alerted to the odor of narcotics approximately 399 times. "FRANKY'S" positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana.

WHEREFORE, Affiant prays that a Search Warrant be issued commanding the Director of the

Miami-Dade Police Department, Miami-Dade County, Florida, who is also known as the Sheriff of Miami-Dade County, Florida, or his Deputies, and the Commissioner of the Florida

Affiant's Initials __/s/__

Judge's Initials __/s/__

Department of Law Enforcement, or any of his duly constituted agents, and all investigators of the State Attorney of the Eleventh Judicial Circuit of Florida, Miami-Dade County, Florida, with the proper and necessary assistance, to search "The Premises" above-described, and all spaces therein, and the curtilage thereof, any vehicles and/or structures within the curtilage, and all persons found on "The Premises" for "The Property" above-described, making the search in the daytime or the nighttime, as the exigencies may demand or require, or on Sunday, and if the same be found at "The Premises," to seize the same as evidence and to arrest any person in the unlawful possession thereof.

/s/
AFFIANT

SWORN TO AND SUBSCRIBED before me this **5th** day of **Dec**, 2006.

/s/
JUDGE OF THE ~~CIRCUIT~~ *COUNTY* COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

Asw Page 7 of 7

Affiant's Initials */s/*

Judge's Initials */s/*

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MIAMI-DADE COUNTY

CRIMINAL DIVISION

CASE NUMBER: F06-40839
SECTION: F008
JUDGE: WILLIAM THOMAS

THE STATE OF FLORIDA,
Plaintiff,
vs.
JOELIS JARINES,
Defendant.

MOTION TO SUPPRESS STATEMENTS AND PHYSICAL EVIDENCE

Comes now the Defendant, JOELIS JARDINIS, by and through his undersigned attorney and files this motion to suppress oral and written statements and/or admissions and physical evidence pursuant to Fla. R. Crim. P. 3.190 and states the following in support of this motion:

FACTS

1. On November 3, 2006, crime stoppers contacted the Miami-Dade Police Department regarding an anonymous tip that the residence located at 13005 SW 257th Terrace was being used as a marijuana grow house.

2. In response to that anonymous tip, on December 5, 2006, members of the Miami-Dade Police Department Narcotics Bureau and DEA Agents conducted surveillance at the above residence.

3. According to the probable cause affidavit, Detective Pedraja did not observe any vehicles parked in the driveway, the blinds were closed on the windows and that the air conditioning unit on the west side of the residence was continuously running without recycling.

4. Additionally, drug detection K-9 "FRANKY" alerted to the odor of a controlled substance. Detective Pedraja stated that he also detected the smell of live marijuana plants emanating from the front door of the residence.

5. Officer Bartelt testified at his deposition that he did not detect the smell of marijuana at the subject residence. In fact, Officer Bartelt only detected only the smell of moth balls.(Deposition transcript of Officer Bartelt is pending)

6. As a result of the above observations, Detective prepared and obtained a search warrant which Judge George A. Sarduy signed that same day.

7. About an hour later, the members of the Miami-Dade Police Department Narcotics Bureau and DEA Agents executed the search warrant by gaining entry into the above residence through the front door. According to the Offense Incident report, a white male, who later became known as Joelis Jardines, the defendant in this case, exited the residence through a rear sliding glass door and was shortly detained by Special Agent Wilson of the DEA.

8. While executing the search warrant, a marijuana lab was allegedly located on the southwest corner of the residence.

9. Detective Pedraja subsequently interviewed Mr. Jardines, who confessed both orally and in a written statement.

10. As a result of the above incident; Mr. Jardines was charged by information with Trafficking in Cannabis, a first degree felony, and Grand Theft of the third degree.

LEGAL GROUNDS

A. Detectives Pedraja lacked the requisite probable cause necessary for the issuance of a residential search warrant based on the use of K-9 Officer "FRANKY" and any independent lawful evidence.

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." **(CITE)** The use of dogs by the police for the purpose of detecting contraband in an individual's home is considered a search under the Fourth Amendment. State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006) The Rabb court relied on the Kyllo v. United States, 533 S. Ct. 27 (2001) decision in reaching its conclusion, and stated that "although the use of such sensory enhancement techniques to detect contraband subsequently seized by warrant may not amount to a search in a place such as a public airport, it does when intruding into a house to discern intimate details." Id. at 9. The Rabb court furthered reasoned that "the risks to privacy are greatest at the threshold of the house; what may be tolerable on a public roadway or in an airport may not necessarily be countenanced at home." Id at 14. Justice Gunther concluded that "at the end of the analysis, the Fourth Amendment remains decidedly about 'place,' and when the place at issue is a home, a firm line remains at its entrance

blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life." Id. at 16. "If that line should crumble, one can only fear where future lines will be drawn and where sniffing dogs, or even more intrusive and disturbing sensory-enhancing methods, will be seen next." Id. at 16.

The facts surrounding the instant case are indistinguishable from those discussed in the Rabb decision. In Rabb, the court suppressed the physical evidence because the police officers olfactory detection of the marijuana proceeded the K-9 officer alerting to the same. In this case, K-9 Officer "FRANKY" was brought to the front door of the subject residence and alerted to the odor of a controlled substance prior to Detective Pedraja smelling live marijuana plants. As in the Rabb decision, this court can not assume that law enforcement detected the odor of marijuana without the use of the K-9 officer. Id. at 15. Detective Pedraja used enhanced, animal senses to detect something inside a home that he might not otherwise have detected in the exact manner that the contraband was detected in the Rabb case. As a result, Detective Pedraja's probable cause affidavit is facially insufficient and the search of Mr. Jardines's home was unlawful.

The court should also consider that the independent lawful evidence comprising the Rabb

decision was significantly more abundant than that observed in this case. In Rabb, after leaving the residence under surveillance, the defendant's car was stopped during a routine traffic stop. The defendant was subsequently ordered out of the vehicle and the police. and a search revealed a cannabis cigarette in the ashtray and two on the defendant's person. Additionally, the police observed two cannabis cultivation books and one cannabis cultivation video on the front drivers seat of the vehicle. In the instant case, the police never made any observations of Mr. Jardines until after their unlawful search and seizure of his home. Lastly, the anonymous tip regarding the subject home did not establish a fair probability that illegal activity was occurring in Mr. Jardines's home. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 527 (1983). The tip was unverified because it came from an unknown individual rather than a qualified confidential informant, nor was it corroborated in the probable cause affidavit by any evidence resulting from surveillance of Mr. Jardines's home. State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006) Other than the unlawful dog sniff, there was no indicium of the cultivation of marijuana within Mr. Jardines's home, such as high pedestrian traffic, a higher than normal use of electricity, or the use of additional air conditioning units. Id. at 11. Consequently, there was no probable cause to support issuance of a residential search warrant and the physical

evidence obtained and statement made as a result of its execution should be suppressed.

B. The good-faith exception to the warrant requirement does not apply to the instant case.

The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). However, Florida law still maintains that evidence resulting from an illegal search cannot be the basis of probable cause supporting a subsequent search warrant. State v. Morsman, 394 So.2d 408 (Fla. 1981) (citing to Purcell v. State, 325 So.2d 83 (Fla. 1st DCA 1976). Leon further states that in the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit. Id. at 23. Although Detective Pedraja stated that he smelled the odor of live marijuana plants near the door of Mr. Jardines's residence, the credibility of that testimony is questionable, as Officer was standing at almost the exact same spot and stated he smelled only moth balls. As a result, the good-faith exception to the warrant

requirement does not apply in this instance because of law enforcement's unlawful use of a drug detector dog at Mr. Jardines's door.

C. The statements made by and the physical evidence obtained from the Defendant are a fruit of the poisonous tree.

Evidence that would not have come to light but for the exploitation of illegal police actions is the 'fruit of the poisonous tree' and thus inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 441 (1963). In this case, Detective Pedraja would not have obtained a residential search warrant and located and subsequently seized the subject marijuana but for his unlawful search utilizing K-9 Officer "FRANKY.". Also, any statements made by Mr. Jardines to the detectives involved in this case were made subsequent to his unlawful detention arid arrest. The taint of the arrest and subsequent search is not sufficiently attenuated from the subsequent discovery of the physical evidence or Mr. Jardines's statements to render either admissible. No intervening independent act of free will occurred to purge the taint of the illegal police activity. Therefore, the illegal arrest and the gathering of the evidence occurred in such proximity of time as to render them fruits of the poisonous tree, and therefore the evidence must be suppressed.

I CERTIFY that a copy of this Motion to Suppress Physical Evidence has been hand-delivered to the Office of the State Attorney, 1350 NW 12th Avenue, Miami, Florida, 33136, on June 5, 2007.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1320 NW 14th Street
Miami, Florida 33125

By: /s/
Brett Steinberg
Assistant Public Defender
Florida Bar No: 0011677

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR MIAMI-DADE COUNTY, FLORIDA
CASE NO. FOG-40839

STATE OF FLORIDA,
Plaintiff,

vs.

JOELIS JARDINES,
Defendant.
----------/

Gerstein Justice Building

Miami, Florida

June 8, 2007

The above-entitled case came on for hearing before the Honorable WILLIAM THOMAS, as Judge of the Circuit Court, in court pursuant to notice.

APPEARANCES:

OFFICE OF THE STATE ATTORNEY
KATHERINE FERNANDEZ-RUNDLE
BY: IVETTE GONZALEZ, ASA
FOR THE DEFENDANT:
BRETT STEINBERG, APD

MS. GONZALEZ: I have three or four cases that you may already be aware of. And I'll still be citing other stuff that I don't necessarily have copies of, but I have it before me and we can talk about it.

THE COURT: Do you have a copy of the -- is it --

MR. STEINBERG: Right. I have it. Mine is marked up, though, Judge.

MS. GONZALEZ: You should have it in there, Judge.

THE COURT: Okay.

MS. GONZALEZ: Oh, you know what? I think I have a clean copy -- no -- I do have my copy. It's written up. I don't care but --

MR. STEINBERG: I can go print you one from our satellite office right now.

THE COURT: We have to wait for an interpreter.

MR. STEINBERG: There is an issue we can deal with without the interpreter right now, if we are on the record.

In regards to an evidentiary hearing, I think you stated earlier in the week you weren't sure if one would be necessary, if we were going to stipulate to certain facts.

I don't know if the State is willing to do that at this point because it is just a legal issue.

MS. GONZALEZ: Well, Judge, I'm not willing to stipulate, and I do want to remind the Court, Judge, that this is the Defense's burden in this particular case.

This is not the State's burden in this motion, and I'm unwilling to stipulate to no testimony because, essentially, that means we are going to rely on the depositions in the case, and I think that the depositions don't really do justice to the facts of the case and what is going to be needed is to argue this law.

So, my point is that the Defense has a burden in this case, so if they are not going to call any witnesses, I don't know how they are going to meet their burden, but I'm not willing to stipulate.

THE COURT: The Defense may have no burden but they filed a motion.

Normally, what happens is the State -- the Defense files a motion to proceed. You then have the burden of proof that the search -- the lawfulness of the search. The Defense is not required to call witnesses in the -- I guess at the inception.

And really, to be honest with you, the Defense has the burden - I don't know what the phrase is.

The Defense has the burden to basically the initiate the proceeding, the process. But it's your burden of proof because once that is met --

MS. GONZALEZ: I did pass up and case law, judge. One is from the Fourth and the other one is from the First, I believe, on this issue.

THE BAILIFF: Interpreter is here.

THE COURT: And all he has to do, the Defense, in my opinion -- and I could be wrong -- he needs to file a motion indicating that his client does have standing, and raise an issue that something was taken from his client illegally.

And once he does that, it's now your burden of prove the legality of the search.

MS. GONZALEZ: So, you are saying that all he has to establish is that he has standing and that something was taken from him.

THE COURT: I think he -- I'm not even sure that it's that simple but I can tell you I have never seen -- and I -- in the 13 years that I have been practicing in state and federal court, I have never seen a Defendant required to present witnesses.

They have a burden, I think, of asserting a valid claim and showing that they had a valid basis to move forward, standing.

You have the obligation to establish the legality, and if you have something that tells me something else --

MS. GONZALEZ: Judge, I don't want to get caught up in this issue because I think it is neither here nor there and my witness is outside. Nonetheless, I think we can accomplish what needs to be done.

I can call him as a witness and direct, but I don't want to get bottled up in that.

But just for now and for future reference, too, I disagree, Judge. I think that this case law establishes that they have the burden of establishing or demonstrating the illegality of the search and that -- a violation of their reasonable expectation of privacy. That's clear from this.

THE COURT: I think they only have to assert it. I don't think that they are required to call witnesses to prove it and if I'm wrong, so be it.

But I'm telling you, I have ever seen it happen, even as a practicing lawyer -- and I filed a Motion to Suppress even in federal court and state court -- I have never had a judge turn to me and say, "Call your first witness, Counsel. You filed the motion."

Every single time, all I had to do was assert I have standing, it was my house that was searched, my house was searched illegally, which I think is by the filing of the pleadings.

But, anyway, that having been said --

MS. GONZALEZ: Okay, Judge. Regardless. I guess we can begin at this time. I'm not stipulating to the depo, Judge.

MR. STEINBERG: Judge, if that's the case and if we are going to have an evidentiary

hearing -- and I think the State will probably agree with me on this issue with regards to a factual dispute, I think the only issue and the only area that needs to be addressed in direct and cross is the issue of the smell of live marijuana plants emanating from the door because, as I state, one officer said he did smell it and the other officer said he didn't.

Other than that, I don't think there's any other factual dispute at issue here in regard to -- and I could be wrong because I"m seeing faces from opposing counsel.

THE COURT: Is there any other factual issue, other than the fact that one officer said "I smelled marijuana," and the other officer said "I didn't"?

And I think what counsel is saying is if we all agree that the other facts are stipulated, why is it necessary to sit here and have the officer just say what we all agree upon?

MS. GONZALEZ: The reason, Judge is because -- my alternative argument Leon, in good faith, and what evidence -- how do I establish that -- the different prongs of Leon as far as whether or not this was done in good faith, if all I have is, "Well, one said yes, he smelled it," and the other one said he didn't, and any other circumstances

surrounding what they did to establish that this officer had good faith.

THE COURT: No, no, no. I guess what I'm saying is that no one is stopping you from advancing evidence as it relates to the legal argument that you are ultimately going to make, but is it necessary to say, for example, "Okay. Tell us, how did you get involved in this case? Who was with you?" --

MS. GONZALEZ: Judge, I think --

MR. STEINBERG: -- and go through every single aspect from the beginning to the end.

If you think it's necessary --

MS. GONZALEZ: No.

THE COURT: -- then go ahead and do it. Actually, I'll make it easier. If you think it is necessary, you ask whatever questions you want to ask, you go into whatever you think is necessary and I'll make my ruling after I --

MS. GONZALEZ: And I won't ask questions that are irrelevant to the issues.

MR. STEINBERG: Judge, if I may, in regard to any other factual issue other than the one I just stated --

THE COURT: It's their burden to establish the legality of it. I'm not going to stop them, because you are willing to stipulate to the facts.

If they want to go through all the facts and lay them out, let them go through all the facts and lay them out. I'm not going to preclude them from doing so.

Call your first witness:

MS. GONZALEZ: And, Judge, one other thing before we begin, I did have a copy of the deposition of both officers and on Officer Bartelt's deposition on page 9, line 4, there's a sentence that says, "The scent is merely the final response from him to receive this praise," and Officer Bartelt did read it, and he invoked to read it.

MR. STEINBERG: I'm sorry, what page?

MS. GONZALEZ: Page 9, line 4.

MR. STEINBERG: All right. I have it.

MS. GONZALEZ: And it's really -- and according to Officer Bartelt, it should say, "The sit is merely the final response from him to receive this praise."

THE COURT: I'm not relying upon depositions, anyway.

MS. GONZALEZ: No, I understand but I mean, I just want the depo to be clear as to what he said and what he meant and that's --

THE COURT: Please call your first witness.

MS. GONZALEZ: The State would call Officer Pedraja.

THE CLERK: Raise your right hand, please, Detective.

DETECTIVE WILLIAM PEDRAJA,

called as a witness on behalf of the State, having been duly sworn by the Clerk, was examined and testified as follows:

THE WITNESS: Yes, I do.

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MS. GONZALEZ:

Q. Detective, please, state your full name.

A. Detective William Pedraja. I'm employed by Miami-Dade Police Department, narcotics bureau, 17 years of employment.

Q. Detective you are here today on the Joelis Jardines case. Do you remember that case?

A. Yes, I do.

Q. Were you the affiant, the person who prepared the search warrant in this case?

A. Yes.

Q. Is the search warrant accurate as to all your training and experience?

A. That's correct.

Q. Detective, can you, please, tell us how you -- do you remember the date that you obtained the information that is stated in the affidavit for the search warrant?

A. I'm going to refer to my reports to refresh my recollection. Friday, November 3rd, 2006.

Q. On that particular date, what time did you go on the property?

A. I set up a surveillance on December 5th, 2006, at approximately 7:00 a.m. in the morning. At about 7:15 p.m. I approached the residence.

Q. So, roughly 12 hours later?

A. No, 15 minutes later.

Q. 15 minutes later.

A. Yes.

Q. I'm sorry. Now, were you the first to sort of approach this home or did any other officer approach first?

A. I was with Detective Bartelt and Canine Frankie.

Q. What did Detective Bartelt -- what did you see Detective Bartelt do?

A. He approached the front door in front of me. He approached towards the front door with his canine. I was behind him.

Q. Where were you at this point?

A. I was behind him.

Q. And when Detective Bartelt -- did Detective Bartelt ever go up to the door of the residence?

A. No, he did not go up to the door.

THE CLERK: State's Exhibit 1A has been marked for identification.

MS. GONZALEZ: May I approach? Thank you.

BY MS. GONZALEZ:

Q. Officer, do you recognize what I'm showing you?

A. Yes.

Q. What is it?

A. The residence in regards to the search warrant.

Q. How do you know that's what that is?

A. Because I recall it.

Q. Okay. And did you yourself take that picture?

A. I did not. It would have been crime scene.

Q. Does that this picture depict the home as it appeared the day that you saw it?

A. That's correct, yes.

MS. GONZALEZ: Judge, at this time I want to enter into evidence what's been previously marked as State's Exhibit lA.

THE COURT: It shall be admitted without objection.

MR. STEINBERG: No objection.

THE CLERK: State's 1A for identification for purposes of this hearing becomes State's Exhibit 1 for the purposes of this hearing.

(State's Exhibit No. 1 was received into evidence.)

BY MS. GONZALEZ:

Q. Detective, can you sort of hold it up so that the Judge can also see it.

Can you indicate in that picture where you were when Detective Bartelt went up to the door?

A. I was standing back here (indicating).

Q. Okay. And where exactly was Detective Bartelt when he was doing whatever he did with the dog?

A. Right before the arches here.

Q. Okay. Fair enough. And do you recall more or less how long the distance was between where Detective Bartelt was at and the door was, if you recall?

A. I don't recall.

Q. That's fair enough. Thank you.

At that point in time, what was it that Detective Bartelt did?

A. He allowed his dog to extend the leash and go up to the front door.

Q. At any point in time did Detective Bartelt give you a signal that the dog had alerted to contraband?

A. Yes.

Q. And once you got than signal, what happened next?

A. Detective Bartelt went away from the front door area and then I approached the front door.

Q. Okay. Was that the first time that you had ever been at the front door?

A. That's correct, yes.

Q. At that point in time did you smell anything that you later indicated in your warrant?

A. I smelled the scent of live marijuana.

Q. Did Bartelt remain on the scene at that time?

A. I don't know where he was at that point because I was focused on the front door.

Q. Did you go and prepare your warrant thereafter?

A. Once I got a scent at the front door --

MR. STEINBERG: Objection.

THE COURT: Overruled.

THE WITNESS: Once I got a scent at the front door, I knocked to try to get -- see if someone was home. There was no

BY MS. GONZALEZ:

Q. Was anyone home?

A. No, there was no response at the front door after several knocks, and then I walked back out and was standing at the front area there, and I heard an AC unit continuously running.

Q. How long did you observe that?

A. Approximately 15 to 20 minutes from the time that I went to the front door, was standing at the threshold, went to the front door and then came back.

Q. Officer, I just alluded to your training in the warrant. How long have you been dealing with hydroponic lab cases?

A. I would say about four years now.

Q. And would you be able to tell us, what is the significance of an air conditioner continuously running as it relates to a hydroponic lab?

A. Well, in a hydroponics lab, they use high intensity light bulb to mimic light during the day for the plant to grow more rapidly.

Q. What is the effect of that?

A. It creates heat.

Q. Therefore is that why there is an air conditioner?

A. An AC unit that subsequently cools the room down so they keep the room at a very low temperature, therefore, not allowing the unit to shut off and just continuously run.

Q. Okay. Thank you, Officer. And after you made these observations about this home, what did you then do next?

A. I went -- I sat back, got in my vehicle. I drove to a location close by and started preparing a search warrant.

Q. And at this point in file had you spoken to Officer Bartelt?

A. I had spoken to him about getting information about his training and his response.

Q. Okay. Was there anything else that you discussed other than his training and his response?

A. No.

Q. Okay. Ultimately, did you get a warrant signed in this case?

A. Yes, I did.

THE COURT: Madame Clerk, can I see the warrant? The affidavit?

THE CLERK: I'll check the file, Judge.

THE COURT: Next question.

MS. GONZALEZ: Yes, Judge.

BY MS. GONZALEZ:

Q. Officer, on this particular day, what, if anything, did you learn about the odor of mothballs at this location on this day?

A. Today's date?

Q. No. On the date that -- on the date that you obtained the warrant, that you did your surveillance and investigation, what, if anything, did you hear from Detective Bartelt about his smelling an odor of mothballs?

MR. STEINBERG: Judge, object. Leading.

THE COURT: Overruled.

THE WITNESS: I don't recall him ever mentioning that to me.

BY MS. GONZALEZ:

Q. Did you inquire of him whether he had smelled the odor of mothballs at this location?

A. No.

Q. Okay.

MS. GONZALEZ: No further questions, Judge.

THE COURT: Cross?

MR. STEINBERG: Just briefly. Good afternoon, Detective.

THE COURT: Can I ask, who signed the warrant?

MS. GONZALEZ: I think it was Judge Sardewey.

THE WITNESS: Judge Sardewey.

MS. GONZALEZ: I'm not 100 percent certain. I think it was a South Dade Judge.

THE COURT: You may inquire.

MR. STEINBERG: Thank you.

CROSS-EXAMINATION

BY MR. STEINBERG:

Q. Good afternoon. How are you?

A. Good afternoon, sir.

Q. Just really quickly, in cases where there's a grow house, it's typical for there to a higher use of electric, correct, in a house?

A. Yes.

Q. And that's something that would be reported maybe on like an FP&L bill or something to that effect?

A. Yes.

Q. And that's something that you could subpoena FP&L for, correct?

A. I believe I would need to get a court order for that, yes.

Q. That's something you could access, either a court order or subpoena?

A. Yes.

Q. And you didn't do that in this case?

A. I didn't do that in this case, because a lot of these hydroponic labs have a diversion in them where they steal the power.

So, even if they were using excessive electricity it wouldn't show significance in their FP&L bill because they're diverting power.

Q. Prior to obtaining a search warrant, you didn't do any inquiries in regard to ascertaining that information, did you?

A. I don't understand.

Q. You didn't try to determine whether or not there was power being diverted or whether or not there was excessive power being used at this residence?

A. I wouldn't be able to tell just from standing outside if there was none.

Q. But you didn't try to contact FP&L to ascertain that information?

A. I wouldn't be able to contact FP&L because they wouldn't give me that information without a court order.

Q. Well, sir, you didn't get a court order to contact FP&L?

A. That's correct, yes.

Q. There wasn't a high volume of traffic at this residence, correct?

A. No, there wasn't.

Q. In fact, there are no cars in the driveway?

A. That's correct, but it's not typical in hydroponic labs for there to be high traffic, and it's contrary to that. There is no traffic.

They don't want to be seen by neighbors, they don't want to associate themselves with neighbors, things of that nature because it's a hydroponic lab inside. They are not selling or buying from that residence.

Q. One more thing: I just want to be clear about your testimony with regard to Officer Bartelt.

Did you -- I think it was clear that you stated on direct that Officer Bartelt did actually approach the door of the residence?

A. No, I did not say that.

Q. And it's your testimony today that he did not approach the doorway, correct?

A. Correct.

Q. How close did he get to the doorway?

A. From what I recall, he was -- if I can show you in the picture.

MR. STEINBERG: May I approach?

THE COURT: You may.

THE WITNESS: From what I can recall, he was about here.

BY MR. STEINBERG:

Q. Which is like at the entry of the archway?

A. That's correct.

Q. About how many feet would you say that's from the doorway?

A. I don't know.

Q. If you could estimate.

A. I'd estimate about six to eight feet.

MS. GONZALEZ: Asked and answered, Judge.

THE COURT: Overruled.

MR. STEINBERG: Can I hear the response?

THE WITNESS: About six to eight feet.

THE CLERK: May I have the exhibit for just a moment?

MR. STEINBERG: Judge, I have nothing else.

THE COURT: Redirect?

MS. GONZALEZ: No, not at all.

THE COURT: Thank you, sir. You can step down.

THE WITNESS: Thank you, Your Honor.

MS. GONZALEZ: The State would like to call Officer Bartelt.

THE COURT: Can you tell Officer Bartelt to come in.

DETECTIVE DOUGLAS BARTELT,

called as a witness on behalf of the State, having been duly sworn by the Clerk, was examined and testified as follows:

THE WITNESS: Yes, I do.

THE CLERK: Have a seat over there.

You may inquire.

DIRECT EXAMINATION

BY MS. GONZALEZ:

Q. Good afternoon, Detective.

A. Good afternoon.

Q. Could you state your full name for the record

A. Douglas Bartelt --

Q. What do you do for a living?

A. -- B-A-R-T-E-L-T.

Q. Where are you employed?

A. At the Miami-Dade Police Department. Narcotics bureau, canine section.

Q. How long have you been in that work?

A. Approximately three years.

Q. How long have you been a police officer?

A. Approximately 13 years.

Q. Detective, are you familiar with the case of Joelis Jardines?

A. Yes, I am.

Q. Have you have ever had an opportunity to view the search warrant in that case?

A. Have I viewed the search warrant? Yes.

Q. Is the information in the warrant with reference to your training and experience, is it accurate?

A. Yes, it is.

Q. Do you recall the date that you did your canine work at the residence of Joelis Jardines?

A. I believe it was December 5th.

Q. Can you, please, tell the Court exactly what you did, as far as your investigation when you stepped onto the property?

A. As far as when I stepped onto the property, I moved towards the front door of the premises up the driveway, which is basically a large sidewalk-driveway combination.

BY MS. GONZALEZ:

Q. Officer, sorry to cut you off.

MS. GONZALEZ: Judge, may I approach?

THE COURT: You may.

BY MS. GONZALEZ:

Q. After you stepped onto the property, what did you do?

A. I, basically, approached with my canine partner. The way my canine partner works, he is very strongly driven, so he is actually out in front of me. He is one of the dogs that will actually pull me around very dramatically.

So he pulled directly up the front porch as he is trained to do, and immediately upon crossing the threshold of the archway which you see here, upon entering the alcove of the porch, he began tracking and airborne odor.

Q. Let me stop you there, Officer.

A. Sure.

Q. At this time in time, how far into this home did you get or into the entranceway of the home did you get? I want you to point to the Court.

A. You see there's a walker there? That's about the area that it was I was in.

Q. There is also an archway there. Did you ever cross in through that archway?

A. Not that I recall, no.

Q. So, where exactly was your dog when he alerted to an alert of contraband?

A. The alert for the dog, basically, is the minute I observed out of normal behavior for him.

In this particular case, the abnormal behavior would have been the head high, tracking the airborne odor. He began tracking that airborne odor by bracketing and tracking back and forth.

Q. What exactly is bracketing?

A. Bracketing is a technique that the dog uses once he comes to an odor -- which is basically you can think of it as a cloud of odor.

Once he gets into that cloud of odor, he is trained to go to the strongest point. We call that source.

So, he is bracketing back and forth back and forth within the cone of odor or to determine the strongest source. In this particular residence source for him was the base of the door.

Q. And is Detective Pedraja observing this as well? You can't speak for him?

A. Yeah, I -- to be honest with you, all I'm doing is concentrating on the dog, watching the dog's head movements, his body postures, whence he is indicating towards me.

Q. Detective, your dog is on a leash at that point?

A. Oh, absolutely.

Q. How long is that leash?

A. It's approximately six feet. And then you have the length of my arm, so you can assume from there.

Q. Okay. Once the dog began -- what is it the dog did that told you he had an alert?

A. Okay. He immediately told he had an alert when he began tracking that odor. Now I know he is in odor and he needs to find source.

So, what I do is I get back as far as I can. I let him have the full six feet of the leash plus whatever safe distance I can give him without running off in order for him to determine where source is.

For example, if I don't do that, source could be the motorcycle, it could be somewhere else other than the front door.

So, in order for me to fully observe his alert and where the source is, I need to be creating as much distance as I can.

Often handlers will drop the leash and walk away completely. I don't do that with him because he is a little bit wild, so I maintain control of the leash and observe him from a distance so that I can indicate where source is going to be.

Q. Okay. So, once he detects a source and he is bracketing and he is doing this behavior, what is the next thing that you observe this dog do?

A. The final culmination of his abnormal behavior is a sitting position, and he did that immediately following the sniff at the base of the door, which indicates source to me.

Q. And once Frankie, your dog, did that, what did you then do?

A. I then pulled him off of the sit and returned to my vehicle.

Q. Did you at any point in time communicate what the dog did to anybody?

A. Yeah, I indicated to the lead detective that there was a positive alert for the odor of narcotics.

Q. And where exactly, in what direction around you, was the detective at that point?

A. He would have been behind me, so I passed him up in the driveway.

Q. Once you pulled the dog away from the door, where did you then go?

A. To my vehicle.

Q. And when you got in your vehicle, what did you then do?

A. I believe I gave him some water, put him in the vehicle and at that point I began preparing my information for the body of the affidavit, if needed be.

Q. What information are you referring to?

A. It's our training, our initial training and statistical information as far as the number of alerts and quantities of narcotics seized.

Q. How long did you remain on the scene on that day?

A. That was a day we were doing multiple operations and I had probably two other people waiting for the dog. So I couldn't have been there much more than five or ten minutes, just enough to grab the information on the flash drive, hand it over and leave.

Q. Did you communicate -- other than in reference to your training information in the warrant, did you communicate anything else with Detective Pedraja in reference to any observations that you made at the door?

A. No.

Q. What, if anything, did you smell that day?

A. I remember smelling mothballs that day.

Q. Did you, in fact, see some mothballs that day?

A. Oh, yeah. I was -- when I was at the base of the front porch, I was standing on them.

Q. Do you know how many mothballs you saw?

A. Two or three.

Q. Did you ever communicate that to Detective Pedraja?

A. No, no need to. I don't really communicate other than just an alert. So I don't talk about that with him.

Q. What is your role as a canine?

A. In this situation, when we're doing door sniffs, it is, basically, full concentration on the dog. There is concern for safety, as I testified. I'm the first person to go to the door.

I don't have the protection of a S.W.A.T. team or any other officers that are going to, basically, protect me. The only defense is myself and the front door.

So, I'm a little bit fearful of somebody, obviously, coming out the door, but my primary focus is on that dog and watching every movement that dog is giving me.

MS. GONZALEZ: No further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. STEINBERG:

Q. Detective, you stated you never went to the front door of the subject residence; is that correct?

A. Correct.

Q. Do you remember coming to my office for a deposition?

A. Yes.

Q. Do you remember taking the same oath you did today --

A. Of course.

Q. -- when I asked you questions? Did you swear to tell the whole truth, nothing but the truth? Do you remember, referring to page 6 of Officer Bartelt's deposition on line -- I'll start right around 5. And I ask -- actually, line 7.

"Was Pedraja at the door of the house?"

And you responded, "He went up there the same time I did."

"The same time you did?"

"Yes."

"What happened when you got there?

Your response, "Went to the front door. Got an alert, low on the scene."

Do you remember giving that testimony?

A. Absolutely. Correct.

Q. It isn't it true also that the first thing that happened when -- and the two of you approached together, correct?

A. We approached, yes, together. We went up to the door, but it's not the door itself, it would be the front porch area including the door.

Q. The first thing that happened was that Officer Frankie indicated to the smell of narcotics?

A. Correct.

Q. That was the very first thing that happened?

A. Yes.

MR. STEINBERG: I have nothing further, Judge.

MS. GONZALEZ: Just a quick redirect.

REDIRECT EXAMINATION

BY MS. GONZALEZ:

Q. Would Detective Pedraja be in front of you as you are conducting canine -- I don't even know what you would call it.

MR. STEINBERG: Object to leading.

THE COURT: Overruled.

THE WITNESS: Would he be in front of -- while Frankie is sniffing the door? Definitely not.

BY MS. GONZALEZ:

Q. Why not?

A. Because he would. be obstructing his ability to perform. He would be blocking him. He would be -- if he was standing in front of the door, Frankie may not be able to get to source. So he needs to be out of the way.

Q. Was Detective Pedraja standing next to you?

A. No.

Q. Why not?

A. Because he probably would get knocked over by Frankie when Frankie is spinning around trying to find source.

MS. GONZALEZ: No further questions.

THE COURT: You may step down.

State, any other witnesses?

MS. GONZALEZ: No, Judge.

THE COURT: Defense, would you like to call any witnesses?

MR. STEINBERG: No, Judge.

THE COURT: Okay. Would you like to make some argument?

MR. STEINBERG: Yes, Judge. Obviously, Judge, the main case to which Jardines -- the State of Florida vs. Rabb, decided by the Fourth District Court of Appeal on February 15th, 2006. The citation, for the record, is 920 So. 2d 1175.

Judge, this is the sole case speaking to this issue in the State of Florida, and also it's my position that it's the only case speaking to this

issue in the nation right now, that specific issue being the search of homes by police dogs as to a dog sniff of a home.

The Supreme Court has made decisions in regard to dog sniffs about an airport, luggage, and dog sniffs with regard to a traffic stop.

But regarding dog sniffs in the home, this is the seminal case on that, and due to the fact there is no other case opposing that in the State of Florida, this law is controlling, and that's the Defense's position.

This case, very succinctly, Judge, the Court decided that, A, there was a search; that a dog sniff does constitute a search. The Court decided that it's an unlawful search of a home. It also cited to another opinion which stated that --

THE COURT: Let me -- factually, where was the dog sniff in this case? Meaning did the dog go to any particular area of the home? In this particular case --

MR. STEINBERG: In Rabb --

THE COURT: -- you have a doorway, an archway, and according to the testimony, the dog was permitted to go, I guess, up to the door.

MR. STEINBERG: Correct.

THE COURT: And that is considered to be a search?

MR. STEINBERG: Yes, Judge.

THE COURT: What happened in that case?

MR. STEINBERG: In this case, at the trial level the evidence was suppressed.

THE COURT: No, what was the search? What were the facts of that case that constituted the search?

MR. STEINBERG: Specifically the issue of where there's a dog sniff, does it constitute a search?

THE COURT: Where did the dog sniff?

MR. STEINBERG: The front door of the home.

THE COURT: Okay. Good.

MR. STEINBERG: And actually, if I may continue, there's a line on page 11 of this, "It

is axiomatic that evidence resulting from an illegal search cannot be the basis of probable cause supporting a subsequent search warrant."

In that case, the facts are actually very, very strikingly similar to this case. In fact, it's the Defense position that there was less probable cause in that case than there was in the instant case.

In that case, Judge, if I may briefly just summarize the facts, they had received a confidential informant tip, an anonymous tip, but in that case the tip was more specific than the tip given in this case.

In this case, the tip was at this house, at this address, there was a grow house. That was all that the tip was given in this case.

In the Rabb decision, there was a name given, an address and even, I believe, a birth date or birth year of the person who was growing the suspect narcotics.

The police began surveillance and they had observed an individual, I think it was Mr. Brown or something, that had been driving around the area, they had found, they had caught him at a traffic stop for illegal changing of lanes or something, and they stopped him, and as a result

of that stop, they found videos and books, I believe, on how to cultivate marijuana.

Furthermore, they had the dog come to the car and they found a marijuana cigarette in the ashtray. As they were placing, I think it was, Mr. Brown under arrest, he also stated that he had a marijuana joint in his sock.

Based on that, they brought the dog to the residence of Mr. Rabb and that's when he indicated to the odor of narcotics and they got their search warrant, and those facts aren't even present in the instant case, Judge.

THE COURT: Are you saying that the Rabb decision says that courts -- I mean, that any time a police officer uses a canine as part of their investigation, if it involves a home, that the use of that canine is tantamount to a search of the home?

MR. STEINBERG: And -- I agree, yes, and an unlawful search at that, Judge.

And the Court's reasoning for that is -- and it is clear in the decision, Judge, that they did find that the searches were lawful in regard to, like I said earlier, a piece of luggage at the airport or furthermore to searching a car at the traffic stop.

There are levels of reasonable expectations of privacy in the Court, and this has been long-standing law that your house, your home is your castle, and the level of expectation of privacy is at the highest when -- in regards to a search of the home.

And that the courts in this decision -- and like I said, there are no contrary decisions, that because there is such a level of expectation of privacy as to allow dog sniffs in homes would be tantamount to allowing police to have searches of intimate details in everybody's home.

They could just walk around with their dogs and sniff everyone's home. That was their rationale in the Rabb decision. So, yes, Judge, it is tantamount to a search.

THE COURT: But they are not entering the home. You are saying that if -- I'm assuming the police can only use their canine to walk in -- I guess that I can walk down a whole row of houses, but they can only do something if the canine alerts to illegal activity.

MR. STEINBERG: But that's what this Court is saying. This Court is saying, and it is the law in the State of Florida right now, that they cannot do that; that the police cannot walk up with

a canine dog and have him sniff for narcotics; and that's a search.

And if that dog does indicate, no matter what the dog's training would be, if that dog does positively indicate to the smell of any narcotic, that is a search, it's an unlawful search and that cannot be the basis for obtaining a search warrant.

THE COURT: So, you are relying primarily on Rabb?

MR. STEINBERG: Well, and I just want to state specifically that the Rabb decision was referring to Kyllo, and on a thermal image scanner, they were detecting heat.

And they drew the analogy to Kyllo, and that's the way the Court reached the decision that this is -- the dog sniff is revealing intimate details of the home and that the home is -- does deserve the highest level of reasonable expectation of privacy.

THE COURT: Does it make a difference whether or not the information is derived from scents actually that are emanating, meaning -- okay, never mind.

All right. What else?

MR. STEINBERG: In regard to the factual issue that we brought up at the evidentiary hearing, Detective Pedraja versus Officer Bartelt.

Judge, in the Rabb decision the Court reasoned that there was actually an indication in the probable cause affidavit in the Rabb decision that the officer smelled marijuana.

But the Court further reasoned that because that smell, the human smell of the marijuana, of the narcotics proceeded the actual alert by the dog, that the human smell was triggered by the dog sniff.

So I'm saying in this case there is a factual dispute that did not exist in the Rabb decision, which was that we had one officer who was at the door of the -- or at least the archway, Judge, who state that he smelled a strong odor of marijuana, live marijuana plants.

We have another officer who hasn't indicated that he has any problems with the use of his nose saying that he smells mothballs.

I understand he explains that because there is mothballs located at the front of the house, but for one officer to say he smells a strong odor of live marijuana plants, and the other one to say he only smells mothballs, I think it indicates that

there may be some suspicion as to whether or not PC was manufactured in this case, that there was not a smell of live marijuana plants in this case.

And even if there was, Judge, the Rabb decision had that smell of live marijuana plants, and the trial court still granted motion to suppress and the Fourth DCA upheld the decision.

THE COURT: If the officer -- let's say that the canine didn't alert to the smell of marijuana and the officer who was at the door or in the vicinity smelled marijuana.

Would you then argue that it should be suppressed?

MR. STEINBERG: If there was no canine, Judge?

THE COURT: Yes. If there was no canine and the officer smelled marijuana and the officer used that information in saying he received an anonymous tip, I went to the home, when I was outside the home, I knocked on the door, and while knocking on the door, I smelled a strong odor emanating from the home.

Based upon my knowledge and experience, it was a smell of live marijuana plants. Leave out anything with respect to the canine,

because you would agree that that occurred before the canine.

MR. STEINBERG: What occurred before the canine?

THE COURT: The officer who had -- who got the strong smell.

MR. STEINBERG: No, I would not agree with that.

THE COURT: It came after.

MR. STEINBERG: It came after, Judge.

THE COURT: Let me ask you. Let's assume that he didn't have that. Would you think that -- would that be a search? And the officer using his five senses?

MR. STEINBERG: Are there any other observations with regard to the home as far as windows being closed --

THE COURT: That's not what I asked you. I'm just asking you, based upon the facts we have, we take out the canine.

The officer using his sense and he smells a strong odor of marijuana, would that, in your opinion, under the case law you cite, be a search?

MR. STEINBERG: That would not be a search. But just to be specific, in the Rabb decision, it was the canine smell that came first that triggered the officer smelling of it, and that was the conclusion of the Court.

THE COURT: And you are saying that's the same that we have in here.

MR. STEINBERG: I think we have an even -- I think there's a better situation, at least in favor of the Defense here, because of the contradiction of the testimony of the two officers present at the front door of the house.

In the Rabb decision there was no contradiction about one officer saying a smell and another officer saying there wasn't, and we do have that present in this case, Judge.

THE COURT: Anything else?

MR. STEINBERG: Just one second, if you would, Judge.

THE COURT: Why don't we hear from the State? Give them a chance to respond.

MS. GONZALEZ: Thank you, Judge.

THE COURT: What's going on with Rabb?

MS. GONZALEZ: Judge, first of all, I'd like to start off by addressing Rabb.

The Rabb decision was a Fourth DCA case. The Defense has indicated that that case is the seminal law in the country on the issue because no other court has ruled on the issue with respect to dog-sniffing at the front door.

In the Rabb decision, what the Fourth DCA found was that, in fact, it was a search and that to some extent there's an expectation of privacy at the front door.

The problem with that, Judge, was that Rabb in the Fourth DCA is inconsistent with the U.S. Supreme Court law as well as Third DCA law, such as -- there's plenty of case law, such as State v Morseman, 394 So. 2d 408. It's a 1981 case.

As well as Potts v Johnson, 654, So.2d 536, a Third DCA case. And in those cases the Florida law is clear that an individual does not

harbor or possess an expectation of privacy on a front porch where a mailman, delivery person, Judge, UPS, mailman, flower delivery guy, visitors, even a Jehovah's Witness is not precluded from going to the front door at any time. That's why there's no expectation of privacy at the front door.

There's also a Florida Supreme Court case --

THE COURT: The problem is that what it sounds like Rabb is saying is that if you are using -- and I think Mr. Steinberg conceded, if you are just using your everyday ordinary senses that God gave you as a delivery man, police officer, whoever you are, and you smell marijuana, that's one thing.

But when you have trained animals who have this heightened level of sensory perception -- I don't know if I'm using that correctly -- that what you are doing is that in an age that we are currently in that technically you, basically, are treading on some thin ice because you can stand outside somebody's house and things can be created that would give you access to everything that's going on in there.

Dogs, as we know now, they can detect money. Dogs can detect -- I mean, dogs are trained

to find human bodies, dogs are trained to do almost anything.

So when was that case that you just cited to me, when was that decided?

MS. GONZALEZ: That case -- there's actually two Rabb decisions. There's one Rabb decision that I think went all the way up to the Supreme Court.

THE COURT: No, no, when was the case that you said that a person doesn't have a reasonable expectation of privacy on their front porch?

MS. GONZALEZ: 1995 is the most recent one that I have. Caballas is, actually, I think a more recent case.

THE COURT: Let me ask you this: Do you have anything specifically dealing with the issue, whether it from the Fourth District, the Third District, the Supreme Court of the United States, that talks about specifically about a factual situation where some type of -- some device other than an individual human's five senses was used to support an affidavit for probable cause?

MS. GONZALEZ: Not at this time. But let me -- I feel compelled to address this whole

Kyllo situation and the fact that we are comparing the thermal imaging device to a dog.

Dogs have been used, bloodhounds, for heaven's sakes, have been used for hundreds of years. This isn't like some new technological concept or object that is being used.

I think that comparing this to a thermal imaging device, I don't think that's a fair comparison, Judge, and I don't think it is analogous.

Even though Rabb did cite to Kyllo and did rely on Kyllo, I don't think there's any other law out there that suggests that now all of a sudden dogs are equivalent to like new technology. They are not. And furthermore --

THE COURT: No, I don't think -- and to be honest with you, I don't mean to suggest that, either, but what I think the Court -- it sounds like -- and I have to be honest with you. I haven't delved into this decision -- but it sounds like what they are saying, this is a slippery slope, and if we get to the point where we start saying that these enhanced abilities of animals can be used and then we are to the point of thermal, you know, thermal imaging, where does it stop?

MS. GONZALEZ: So, Judge, basically, I have more to comment. Does that mean we can't use psychics to investigate?

You know, you are saying that's a slippery slope, and I understand where you're coming from, but there's really nothing out there to sort of support the direction that the Fourth DCA is going.

And also, Judge, I want to clarify on the facts of Rabb as I know them to be.

THE COURT: Okay.

MS. GONZALEZ: The facts of Rabb are somewhat -- they are what Mr. Steinberg has alluded to, but I want to inform the Court even more.

What happened in Rabb is that they received that tip; they started coming upon this house. Mind you, the tip in Rabb, they were saying the individual in that room -- the name wasn't even accurate, it was like John Brown or James Brown and it ended up being James Rabb. So as far as the accuracy of the tip --

MR. STEINBERG: That's not correct.

THE COURT: She didn't interrupt you.

MS. GONZALEZ: That's a sort of a side note. In that case they come upon the house and surveil the house. The individual from the home, the defendant in the case, leaves in his vehicle. He commits an infraction.

When they stop the vehicle, they observe the marijuana books, the cultivation books, and the video, and they also have a dog that comes and alerts to marijuana in the vehicle.

At that point in time they ask the individual in the vehicle for consent to search the home, and that individual did not give consent to search in the home.

Nonetheless, the police officers went with the dog, of course, relying on case law and experience that they had that they can do that, and they went ahead and sniffed.

In this home, the home in the case today, there's nothing in this home suggesting that -- not a fence.

It is a completely open area there's nothing in this home suggesting that there's a reasonable expectation of privacy. I think there's a

distinction between where a defendant clearly comes out and says no, you cannot search the home, and then the officers nonetheless go to the home with this dog to try to obtain information from --

THE COURT: What is the distinction? Because if your position is correct, the only thing the officers did -- they didn't go inside the home.

The mailman can go inside to deliver the mail. The delivery people can go inside to deliver flowers or whatever it happens to be.

So why would that be an important distinction, whether or not someone said, yes, you can search or no, you can't search?

MS. GONZALEZ: I think because when somebody says no, you cannot search, now you are getting toward that slippery slope.

Now you say, you know, I'm going to use the case law and use what the courts have upheld to go ahead and search your home. I think that's when you're approaching a slippery slope.

THE COURT: Are you suggesting, then, that the fact that if somebody says no, you can't search, then the officers then can -- if the

officers then use the canine to actually search, that would be improper.

MS. GONZALEZ: No.

THE COURT: But if the officer -- if the defendant never said no, and the officers used the canine, then that would be appropriate.

MS. GONZALEZ: By no means is that what I'm suggesting. All I'm trying to do is establish a distinction where the Rabb decision was going, where the Rabb Court was going when they decided to determine that a front door has a reasonable expectation of privacy, contrary to what any other Court in this nation has held on that specific issue, not with respect to dogs.

Because Your Honor basically alluded to a concern as far as that slippery slope, and while I understand where you are coming from with that, I think you need to take into consideration where the Rabb court was at and whatever facts they were dealing with when they decided this particular case.

And, Judge, there's plenty of -- this issue is not by any means new in this courthouse.

You know, this issue has been brought up before another judge and judges have decided

not to follow Rabb, and there are some judges who have decided to follow Rabb.

I know that there's one specific decision that is set for argument, oral argument on Monday with respect to this issue.

It's another -- it's a case that occurred in this jurisdiction that the state law on a similar motion, although we had one on this motion in other courtrooms, and it's being argued on Monday.

So, my primarily argument, Judge, is that first of all, Rabb is not binding by any means because it's the seminal case on this specific issue, and it's not binding, and at the very -- it's persuasive, but again, you need to look at the facts in our two cases.

And my main concern is that all the Supreme Court case law on the issue and all the Florida case law on the issue suggest that Rabb was wrong, or not is moving in the right direction when they decide that they have -- they do not -- I'm sorry, that you do have a reasonable expectation of privacy.

THE COURT: Well, I know you said that, but I guess what I want to know, are there any Third Circuit Court cases, Fourth Circuit,

Florida Supreme Court, any cases where a canine dog was used to facilitate a search and the Court upheld the search or the Court did what they did in Rabb and said that search was not -- this has to have occurred -- this is not the first time this has happened. There have to be cases out there where this has occurred.

MS. GONZALEZ: Judge, on this specific issue, Judge, no.

THE COURT: No, no. All I'm saying is that a situation -- maybe your answer is "No."

A situation where the house is searched, and the dog is used to facilitate that search, or to establish the probable cause. Dogs, like you said, have been used by law enforcement for a long time. Rabb just came down in 2006.

What about all those searches prior to 2006? There has to be some authority out there, either within the Third District or in adjoining or sister circuits that address this issue.

MS. GONZALEZ: Judge, let me cite you to a case, U.S. Supreme Court case. The first one is U.S. v. Base --

THE COURT: Does it involve a house and a dog?

MS. GONZALEZ: I believe that does, in fact, involve a dog sniff.

THE COURT: In a house?

MS. GONZALEZ: It could be a vehicle.

THE COURT: Because house and a dog is too distinguishable to for me -- to give me the type of guidance that I need.

MS. GONZALEZ: I think it's a vehicle, Judge, no.

THE COURT: And that won't help because that is distinguishable. I know -- well, maybe I'm wrong, but this issue had to have come up.

MS. GONZALEZ: That's why I asked for a reset until next week. I haven't found anything. And I think Mr. Steinberg hasn't either.

THE COURT: Well, I'm not sure he necessarily wants to. He has a case that is very favorable for him, from his perspective.

MS. GONZALEZ: I know I need to look for it, and no, I can't.

MR. STEINBERG: May I?

THE COURT: Let me see. You can go ahead now while she's looking. You can go ahead and talk.

MR. STEINBERG: Well, Judge, I just want to address something that you said I sort of conceded to.

I just had a change of thought with regard to the human smell of a home. It would be tantamount to somebody at a car or luggage, as there is Supreme Court issues on smelling luggage and saying "I smell marijuana" and then opening it. I just don't think that's allowed.

THE COURT: That's not what I said. I don't think the officers -- and I didn't take that as what you said.

The officers can be outside and smell marijuana using their own senses, but that doesn't mean they can go inside and search. But it can be used as a basis for probable cause to get a search warrant.

I have another question.

MR. STEINBERG: For me?

THE COURT: And I'm asking because I don't know the answer to this, and I'm not suggesting anything, and I really don't know the answer and I'm curious.

I don't know Judge Sardewey. Is that a circuit court or a county court judge?

MS. GONZALEZ: I can't answer that for you right now, Judge.

THE COURT: And does that matter?

MS. GONZALEZ: I don't think that matters at all.

THE COURT: Anyone?

MS. GONZALEZ: As long as he's authorized to make the determination and sign the warrants.

THE COURT: See, because a county court judge does not have jurisdiction over felonies, and I mean, this was clearly a felony that they believed was in the process of being committed.

And I'm wondering whether or not -- I'm asking, I don't know, whether or not, in order for a county court judge to be able to sign off on a felony, affidavit for a felony warrant, there would

have to be some cross-designation to permit them to do so, meaning all county court judges or an administrative order permitting all county court judges, as it relates to probable cause on search warrants or affidavits.

MS. GONZALEZ: Judge, I don't know a definitive answer to that. I can tell you I know it required a neutral magistrate or judge. I know that doesn't answer the question. That's the extent of my knowledge on the issue.

THE COURT: The only reason I ask it is because we have a -- I know that obviously, circuit court judges, if you went to a circuit court judge for a county court misdemeanor, you don't have an issue.

MS. GONZALEZ: No.

THE COURT: I wasn't familiar, and all of our circuit court judges, I don't think we have a circuit court judge sitting in South Dade. They are either downtown or here or in juvenile.

MS. GONZALEZ: The only thing I can think of, Judge, as far as dealing with misdemeanor cases and felony cases, there's one thing if you are crossing jurisdictions.

But when you are dealing with search warrants, basically, it's not -- I don't think it's the kind of situation where only -- you know, I mean, felony judges can't review search warrants.

First of all, I'm sure there's less felony judges than there are, you know, county court judges as a whole, and I don't know how this system would work if it was under that constraint.

THE COURT: Well, we have a judge who has a dufy, they are called emergency duty, and anytime someone needs a -- in fact, county court has an emergency judge on duty circuit Court has an emergency judge on duty, civil court has an emergency judge on duty, juvenile has an emergency judge on duty, dependency has an emergency judge on duty.

And, again, you could be 100 percent correct. It just popped into my head.

MS. GONZALEZ: Unfortunately, Judge, I just don't have a definitive answer for you.

THE COURT: Do you have an answer?

MR. STEINBERG: We are trying to get one right now. Mr. Young is contacting our appeals department.

MS. GONZALEZ: Judge, can I finish my argument?

THE COURT: Do you know the answer?

MS. ZAHRALBAN: I don't know the answer off the top of my head. I'll find out.

MS. GONZALEZ: Can I continue with my argument, Judge?

THE COURT: Go ahead.

MS. GONZALEZ: Okay. Thank you. Obviously, Judge, my position is that Rabb is inapplicable for all the reasons I have set forth.

But let's assume, obviously, arguing in the alternative, that Your Honor did decide to follow Rabb, although Your Honor is not bound to. At least that's my position.

Even if you going take out this canine alert to the fact of the contraband in the area in which he was smelling, I would still argue, Judge, that the smell of live marijuana that the officer himself observed with his training and experience together with all the other factors that were indicated in the affidavit, such as the crime stoppers tip, such as the fact that the home, the

blinds were closed -- actually, that was one of the indications that Rabb alluded to, as far as that they thought they didn't have in their case. But we actually do have that in our case and in our warrant.

So I think even without the canine circumstance, I still think that there's probable cause in this search warrant.

So, assuming that we don't have the canine, there's still probable cause for this warrant, it's still a legal search, and Your Honor should deny that motion.

THE COURT: Don't you think that this would -- that's why I asked the question as to when the canine search occurred.

MS. GONZALEZ: And I have an answer for you.

THE COURT: Because if the search occurred -- if I find that Rabb applies and that the search occurred prior to the officer smelling it, then you have already searched the house. I mean, technically the search is already conducted.

MS. GONZALEZ: No, Judge.

THE COURT: If I find it's a search, how could -- I mean, I find there was a search when the canine sniffed it and alerted, and the officer then comes and smells the same thing that the canine was already alerted to, the search has already occurred.

MS. GONZALEZ: So, basically, you are suggesting if we lose the canine, does it make it all an illegal search? There are all the other probable cause, meaning the search of the officer observations.

THE COURT: If Rabb stands for the position -- and I haven't fully read it, but if Rabb stands for the position that the canine search is a -- sniff is a search. Then at that point the illegal search has occurred.

So, now I'm trying to figure out how do you then -- inevitable discovery.

MS. GONZALEZ: No, Rabb doesn't stand for that, I don't believe, because in Rabb -- I don't believe Rabb stands for that.

I don't believe Rabb says, oh, well, the search -- I think that what Rabb says is that you just lose that one circumstance and then whatever you have left, is -- you know what? It does stand

for that? Now that I'm thinking in the process of arguing.

THE COURT: I don't think you'd be arguing --

MS. GONZALEZ: It gets circular, Judge, and you kind of have to put things in order. Rabb stands for the fact that they lose the dog sniff because it was a legal search.

So, the only thing that was left was the books that were in the vehicle, the videos that were in the vehicle and the marijuana in the vehicle.

And what the Court in Rabb found that there is no probable cause to suggest that there is a marijuana house being grown.

THE COURT: Is that accurate, that Rabb stands for the proposition that you lose the information with respect to the canine sniff and you have to make a determination whether or not probable cause existed absent the canine sniff, and if this Court finds that probable cause existed absent the canine sniff, then I should uphold the search, and if I find that it doesn't exist, I should find that it was -- is that your position?

MR. STEINBERG: Well, Judge, the Rabb decision addresses that. I mean, they consider them separately.

They considered the dog sniff. They determined it was an unlawful search, and they also considered all the other evidence, which is more than what --

THE COURT: My question is that simple. My question is, does the Rabb decision say it's an illegal search; therefore, the fruits of that illegal search need to be suppressed, or does the Rabb decision say that it's an illegal search because the canine sniff was used?

MS. GONZALEZ: Take out the canine sniff and determine whether or not you have probable cause based upon what's left and then make your decision.

MR. STEINBERG: I believe Rabb stands for the former and, Judge, if I may --

THE COURT: Let her finish.

MR. STEINBERG: Okay.

MS. GONZALEZ: Okay. Judge, I'm going to look for why I believe that in the case law.

Let me go back to my argument and I have something to address with respect to the search warrant and who can sign it as well as what we just discussed about Rabb.

Assuming that we lose the canine, okay, assuming that we lose the canine, Officer -- Detective Pedraja smelled the odor of marijuana.

And again, I already addressed this earlier, I think that's enough PC at that point in time to say the search was valid.

Again, in the alternative, let's just say, that Your Honor decides and Your Honor is considering that that's not enough.

THE COURT: So, you are saying that simply receiving an anonymous tip and the officer going to the house and smelling marijuana and the blinds being closed is enough for a search warrant?

MS. GONZALEZ: Judge, and I would argue Daniel Ramize v State, Third DCA case. You were actually the judge in that case. You are cited here as the Judge and I believe --

THE COURT: I could be wrong. It's happened before.

MS. GONZALEZ: I recall that to be the holding.

MR. STEINBERG: What was the holding in that case?

MS. GONZALEZ: Well, the opinion says, "William Thomas, Judge," and then it says before -- it was, basically, affirmed and they cite State v Morseman --

THE COURT: Yeah, but what were the facts? I don't remember the case, but was it a canine sniff case?

MS. GONZALEZ: No, but I think it was a case -- one second.

Judge, in that particular case, it was the officer's smell, and what he observed as well as the indicative signs that a marijuana house was being grown, which had the air conditioner running and things of that nature. So that's the only -- right now.

So, I would ask Your Honor that, in fact, that is probable cause and therefore a search warrant is good.

Again, in the alternative, let's just say that Your Honor finds that that is not PC, that's not probable cause.

And, again, I would argue Leon, Judge, and under the Leon decision -- let me cite to the actual test, Judge. I laid it out as a test, Judge.

Basically, under Leon, "Suppression remains an appropriate remedy under a situation where the judge, the sitting judge finds that there was no probable cause if, one, the magistrate or judge issuing a warrant" -- the warrant in this case by Sardewey -- "was misled by information in an affidavit that the affiant," Detective Pedraja, "knew was false or would have known was false except for his reckless disregard for truth, or that the issuing magistrate" -- again, Judge Sardewey -- "wholly abandoned his detached and neutral role."

I don't think there's any evidence of that, Judge.

Let me just address that test. Judge, that's why I went with the whole -- when I elicited the testimony, I went with the whole thing of where Detective Pedraja was at when he smelled what he smelled, whether Detective Bartelt smelled the mothballs or not, Judge.

I think in his motion, Judge, Mr. Steinberg alluded to the fact that there was bad faith here because one officer smelled the marijuana and the other officer didn't.

But I think to figure out whether that is in fact suggestive of bad faith, Your Honor has to take into consideration the testimony that you heard and the way it was being developed. Basically, it's the idea there is no bad faith there, Judge.

Detective Bartelt does what he does. He goes up to the house or that portion of the house where he indicated to the dog alert.

He indicated to Pedraja he's got an alert, and at that point he moves out of the way and Detective Pedraja goes in again to attempt to obtain a scent, or, alternatively, that was at the point that he smelled what he smelled.

Bartelt did testify that he was standing on top of mothballs and that is what, in fact, he did smell, Judge, but that in no way suggests that Detective Bartelt said to Detective Pedraja, "Hey, I don't smell any marijuana. What I smell is mothballs."

And then Detective Pedraja says, "You know what? It doesn't matter. I smell cannabis and

that is going to be enough for me, and I don't care whether or not you did smell mothballs."

I don't think the record suggests that in any way. That's why I think that in this case we don't have that misrepresentation, that dishonesty.

And then obviously, I did say that there's no suggestion that the magistrate in this case, the judge, was in any way detached, neutral -- abandoned his detached and neutral role.

What I consider another measurement for Your Honor to determine whether there's good or bad faith -- and this is directly from the case law -- is number one, if the affidavit is so lacking in the indicia of probable cause as to render the official -- meaning -- if the affidavit is so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable, then in that circumstance you can say there was bad faith.

In other words, with the facts that we have here, the officers should have known there's no way that a judge is going to find PC.

But you know what? Let me try anyway to see if I can get him to sign anyway, and see if there is a way I can get him to sign it.

There is no suggestion of that and there is no suggestion of that primarily because of the officers, not just the facts I laid out and the testimony that I elicited, but this officer's training and experience, and the fact that he's dealt with this a number of times and a number of years.

This is not the first time he has submitted for a search warrant under these facts. So he had no reason to believe there was no probable cause in this case.

A second measuring stick, which is what I call this, was a warrant so facially deficient that an officer can not reasonably presume it to be valid.

And that's sort of just another way of saying what I just indicated, think of both of these circumstances where both these measuring sticks can apply. That's exactly what it is, Judge.

There's no reason that Detective Pedraja should have believed that this affidavit was not valid. I mean, essentially, when you read the search warrant, you have before you, the -- presence is laid out, the training is laid out.

I mean, all the requirements of a search warrant are in that warrant. Everything that he observed is in that warrant.

So, to suggest there's any bad faith in this particular case, it just didn't match the facts in the testimony that's been presented today.

So, that's why I argue that at the very least, this motion should be denied because Leon does apply, Leon does save this motion if Your Honor finds that there's no probable cause.

THE COURT: Tell me about the county court judge. You said you had the information.

MS. GONZALEZ: I was going to read it to you later. It says S. Florida Statute §933.01. Persons Competent to Issue a Warrant.

And that says, "A search warrant authorized by law may be issued by any judge, including the committing judge of the jurisdiction where the place, vehicle or thing to be searched may be. So it basically says any judge.

And, again, Judge, I'm very limited on my knowledge as to this particular issue so I don't want to start making --

THE COURT: I guess part of the concern that I have is that -- I don't know, where was this signed? The search warrant, January

24th of 2007. It looks like it was filed December 15th of 2006.

All right. What say you, sir?

MR. STEINBERG: I want to retract something I said to you earlier when you asked me about fingerprint evidence outside the unlawful search.

I was just reading within the Rabb decision. It is actually the unlawful search to be excised, and you are to determine outside of that if the independent evidence other than the dog sniff does amount to probable cause.

THE COURT: And you are saying that if I take out the dog sniff that the fact that the detective smelled the strong odor of marijuana, if I accept that as credible, and the air conditioner running and -- constantly running, and other than the blinds being closed, that that within itself is not enough. More is needed.

MR. STEINBERG: Judge, I actually think the Defense position is that you should excise the officer's smelling of it also due to the fact of the Rabb decision, because his smell of the odor proceeded from the dog sniff as does the Rabb decision.

THE COURT: So does the Rabb decision say -- I thought you just said that I excise the canine.

MR. STEINBERG: And then you -- because the Rabb decision does -- if I may cite to the decision, just for the record, on page 15 of the Rabb decision, okay.

"For reasons discussed throughout this opinion, we simply conclude that this case is unlike those cited by the Defense as far as due to insufficiencies in the probable cause affidavit.

"First, because the chronology of the probable cause affidavit suggests that the dog alert to marijuana occurred prior to the law enforcement detection of its odor, we cannot assume that law enforcement detected the odor of marijuana before the dog alerted as is suggested by the Defense."

So, Judge, I think the Court is the required to follow the law in this case in which even an officer's detection, a human detection of a scent of marijuana comes after the dog alerted to it, that needs to be excised. That can't be considered.

And I see -- outside of that, Judge, I think this Court should take into account the fact

that the Rabb decision and the facts of that were so strikingly similar.

In fact, they had more probable cause -- and I'm talking about when you excised the unlawful part of the dog and the proceedings of the officers.

The probable cause was more abundant in the Rabb in regard to the probable cause affidavit than it was in the instant case.

THE COURT: What about this whole issue of basically the argument is that the officers -- they did what they believed they were -- they had authority were to do.

They did what they were supposed to do. They went to a judge, a neutral magistrate. They asked the magistrate to review the facts as they understood them to be.

If it wasn't the law -- I mean, if they didn't have sufficient basis under the law, then it was the Judge's obligation to tell them they didn't have sufficient basis under the law and not sign it.

But since they relied upon the neutral magistrate's decision that it was a good faith decision, that it should not basically cause them -- cause their actions to be held improper.

MR. STEINBERG: Judge, in response to your inquiry, I believe there are several reasons why Leon and moreover the good faith exception to the requirement do not exist here.

Specifically -- and I already cited this, but the Rabb court was citing to State v Morseman, 394, So.2D 408, which is a Supreme Court case and is still good law.

It says, "It is axiomatic that evidence resulting from an illegal search cannot be the basis for probable cause supporting a subsequent search warrant."

Very specifically Leon and the string of cases coming after Leon don't address the situation in which everything that was found and was the basis for a search warrant was all preceded by an illegal decision.

That's the case in the Rabb decision. That's the case in Mr. Jardines' case. And that's the distinction between this case and the Rabb case -- and Leon.

Moreover, Judge, in regards to Leon and the good faith and applying it, it's very obvious that this decision was decided a year ago, and Leon was in existence long before that, 20-some-odd years.

THE COURT: Was your case a search warrant case, where the police got a search warrant and then they went and found the drugs? I mean Rabb.

MR. STEINBERG: Yes.

THE COURT: So it was a search warrant?

MR. STEINBERG: Yes.

THE COURT: And they were executing a valid search warrant.

MR. STEINBERG: Yes, sir. May I continue, please? In regard to the good faith, the issue of the exclusionary rule is discussed in the Leon decision.

I think it is very important for this Court to focus on that the rationale is that the exclusionary rule is designed as a safeguard to -- rather than as a Constitutional right of the aggrieved.

Now, what is very important in this case is that the Court in Rabb was trying to deter the police from conducting unlawful searches and anything else that precedes it by the use of a dog sniff at the front door of people's homes, which

receives the highest level of privacy, Judge, and that's exactly why the good faith exception does apply.

Leon did not involve an unlawful search that led to everything else, and discussion of the exclusionary rule is one of those cases where the evidence should be excluded based on the fact that there was an unlawful search, and it set a stream of events that wouldn't have occurred but for the unlawful dog search, and the probable cause, independent of the dog sniff and human smell --

THE COURT: All right. I think I have heard enough.

MS. GONZALEZ: Judge, can I make just one more comment?

THE COURT: All right. One more comment.

MS. GONZALEZ: When Counsel responded as to the good faith argument, arguing that Rabb doesn't think that -- we shouldn't be using illegal conduct such as a search with a dog, and Leon doesn't want -- that shouldn't be supported.

I think Your Honor should take into consideration the policy behind Leon.

The policy behind Leon definitely was we don't want a to contribute or talk or engage in illegal activity when they themselves believe that they're engaging in illegal conduct, and they put all this together and take it to a judge, and the judge says it's okay. That's the purpose of --

THE COURT: But isn't that what happened in Rabb? They went to the judge on good faith. They didn't make -- the judge didn't find they were making anything up. They did their lawful duty and they did it in good faith. But the judge said no.

MR. STEINBERG: I don't know if Leon was argued in Rabb. That's all I can say about that. So if it wasn't argued in Rabb, then to some extent that's sort of a new argument in the whole crux of it all, and Your Honor should take it into consideration.

THE COURT: Again, I say I believe there's a case out there that has nothing to do with dog sniffs and houses.

So, here's what I'm going to do. I'm going to give y'all until Wednesday to find it. I'll issue my decision on Wednesday.

If y'all give me something prior to Wednesday, I'll fully consider it. Then we'll go from there.

MR. STEINBERG: Judge, do you want Mr. Jardines to be present Wednesday.

THE COURT: Well, yes, because I may have to set a trial date or in the alternative, we'll have to --

MS. GONZALEZ: Get an order.

THE COURT: Wednesday at 9:00 o'clock a.m.

Court will be in recess.

Wednesday the 13th.

MS. GONZALEZ: Before you recess, just to get some clarity on the issue, number one, do I need to look into the whole -- what I tried to -- §933.01?

THE COURT: I'm going to ask the administrative judge and ask legal, but if you want to submit something to me, that probably would be helpful.

But other judges who have been around a lot longer, I'm sure if I ask the question they'll tell me like that.

MS. GONZALEZ: And my next point is, you want us to address case law that addresses the use of dog sniffs in the searches of homes.

THE COURT: Right. I mean, prior to -- in other words, prior to the Rabb decision in 2006, I'm sure dog sniffs were used to search the outside of the home, the curtilage or whatever.

And if those cases were upheld, what was the rationale for them being upheld? Rabb seems to take a different position.

I'm not saying it's a wrong position but it's a different position. Rabb cites to some cases that are contrary to its decision, maybe a dissent. Was there a dissent in Rabb?

MR. STEINBERG: Yes.

THE COURT: The dissent may have said something that kind of gives us some idea of what is really going on.

So, I think there's something there. You suggested that maybe if you had some additional time, you might be able to find it.

So I'm going to give you until Wednesday -- well, really you only have until Tuesday at 5:00 o'clock because I'll make my decision on Wednesday. But maybe you'll find something to put this to rest.

MR. STEINBERG: Just to be clear. The scent, the Supreme Court cases were referring to luggage. We'll see you. Have a good weekend.

(Proceedings concluded at 2:04 p.m.)

CERTIFICATE OF COURT REPORTER

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

I, BRYNN DOCKSTADER, Court Reporter for the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for Dade County,

DO HEREBY CERTIFY, that I was authorized to, and did, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages constitute a true, accurate and correct computerized transcription of my report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Miami, Dade County, Florida, this 6th day of January, 2008.

/s/
Brynn Dockstader, RMR

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff.
vs.

JOELIS ALEX JARDINES,
Defendant.

Case No. F06040839
Section No. 08
Judge Thomas

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE

KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit of Florida, by and through the undersigned Assistant State Attorneys, moves this Court to deny the Defendant's Motion to Suppress Physical Evidence and in support thereof states:

STATEMENT OF THE CASE AND FACTS

On Friday, November 03, 2006, information was received from a crime stoppers tip that there was marijuana being grown at the listed address. The address of the residence is 13005 SW 257th Terrance. On Tuesday, December 05, 2006,

members of the Miami-Dade Police Departments Narcotics Bureau and agents from the Drug Enforcement Administration conducted surveillance at the residence. Detective Pedaja observed no vehicles parked in the driveway. The information was provided to other units in the area. The following is the sequence of events in the investigation. Detective Pedraja and detective Bartelt with drug detection K-9 "FRANKY" approached the residence in order to obtain consent to search. Sgt. Ramirez and Detective Donnelly establish a perimeter positions around the residence with agents of the DEA as a support unit. Detective Pedraja also observed windows with the blinds closed. While at the front door, drug detection k-9 "FRANKY" did alert to the odor of a controlled substance emanating from the front door of the residence. The scent of marijuana is a unique and distinctive odor unlike any other odor. Detective Pedraja, in an attempt to obtain written consent to search, knocked on the front door of the residence without a response. While Detective Pedraja was at the front door of the residence he smelled the distinct odor of Marijuana coming from the residence. Detective Pedraja also heard an air conditioning unit on the west side of the residence continuously running without recycling. The combination of facts is indicative of marijuana cultivation. Based on the information provided, agents of the DEA established surveillance and detective Pedraja began the preparation of a

search warrant. The search warrant was then signed by the Honorable Judge George Sarduly, County Court Judge for the Eleventh Judicial Circuit of Florida. (See attached Exhibit #1, search warrant)

ISSUES

1. MIAMI-DADE POLICE DEPARTMENT HAD PROBABLE CAUSE FOR THE SEARCH WARRANT FOR RESIDENCE LOCATED AT 13005 SW 257TH TERRANCE, MIAMI, FLORIDA?

i. DETECTIVE PEDRAJA ESTABLISHED PROBABLE CAUSE PRIOR TO THE INTRODUCTION OF THE DRUG-DETECTION CANINE BASED ON THE OFFICER SMELLING THE ODOR OF LIVE MARIJUANA, TRAINING, OBSERVATIONS AND THE CRIME STOPPER TIP.

ii. INTRODUCTION OF THE DRUG-DETECTION CANINE OUTSIDE DEFENDANTS HOUSE DID NOT VIOLATE THE DEFENDANT'S FOURTH AMENDMENT RIGHTS?

iii. THE EVIDENCE OF THE MARIJUANA IS ADMISSABLE UNDER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY

RULE AUTHORIZED BY *UNITED STATES V. LEON*, 468 U.S. 897, 104 S. CT. 3405 (1984)

ARGUMENT

I. MIAMI-DADE POLICE DEPARTMENT HAD PROBABLE CAUSE FOR THE SEARCH WARRANT FOR RESIDENCE LOCATED AT 13005 SW 257TH TERRANCE, MIAMI, FLORIDA?

The defendant's position is that their insufficient evidence existed to establish probable cause for a search warrant. On November 03, 2006, police received information from an anonymous source that marijuana was being cultivated at Defendant's house. On December 05, 2006, Detective Pedraja walked toward the premises on the sidewalk and immediately smelled marijuana while standing in front of the premises. Detective Pedraja and other police officers responded to the premises and introduced a narcotics canine to the front door of the premises. The canine alerted police to the front door of the premises. Based upon the evidence they had gathered, police were granted a search warrant. Once inside the house, police discovered a marijuana hydroponics laboratory. The laboratory had more than 25 pounds of marijuana. The defendant, an occupant of the premises, was arrested for trafficking in marijuana.

The Fourth Amendment to the United States Constitution provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. Under Article I, Section 12 of the Florida Constitution, the right to be free from unreasonable searches and seizures Ashall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. And, the task of the magistrate who issues warrants

> is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for conclud[ing] that probable cause existed.

Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002). Although no single piece of evidence may be conclusive, a magistrate's determination should be upheld where a piece fit neatly together to support the conclusion that contraband or evidence of crime would be found at the location to be

searched. *See Massachusetts v. Upton*, 466 U.S. 727, 733 (1984).

A. DETECTIVE PEDRAJA ESTABLISHED PROBABLE CAUSE PRIOR TO THE INTRODUCTION OF THE DRUG-DETECTION CANINE BASED ON THE OFFICER SMELLING THE ODOR OF LIVE MARIJUANA, TRAINING, OBSERVATIONS AND THE CRIME STOPPER TIP.

The Defendant has no reasonable expectation of privacy regarding his front yard nor did he have a reasonable expectation of privacy regarding any odors detected by Detective Pedraja while standing at Defendant's front door. According to the Florida Supreme Courts decision in *State v. Morsman*, 394 So. 2d 408 (Fla. 1981),

> When the officer went to respondent's front door to investigate the neighborhood complaint, he was not infringing upon respondents privacy. Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time. *State v. Detlefson*, 335 So.2d 371 (Fla. 1st DCA 1976); *State v.*

Belcher, 317 So.2d 842 (Fla. 2d DCA 1975).

Id. at 409; *see also Fla. Dept of Agric. & Consumer Servs. v. Haire*, 836 So. 2d 1040, 1055 n.7 (Fla. 4th DCA 2003) (noting that an unfenced front yard is generally not considered protected by the Fourth Amendment due to the lack of expectation of privacy in what is visible to the entire public); *Wysong v. State*, 614 So. 2d 670, 671 (Fla. 4th DCA 1993) (finding that an unfenced front yard was equivalent to an open field through which the officer passed to get to the threshold front door); *Koehler v. State*, 444 So. 2d 1032, 1033 (Fla. 1st DCA 1984) (determining that an unenclosed front porch is unprotected by the Fourth Amendment); *State v. Detlefson*, 335 So. 2d 371, 372 (Fla. 1st DCA 1976) (it cannot be said that defendant had a reasonable expectation of privacy in the front porch of his home where, presumably, delivery men and others were free to observe the plants thereon.). Based upon the holdings in *Morsman, Haire, Wysong, Koehler*, and *Detlefson*, Detective Pedraja was permitted to walk to the front door of Defendant's house. Therefore, Detective Pedraja was not violating Defendant's Fourth Amendment rights by walking to Defendant's front door and smelling marijuana plants. The Third District Court of Appeal holding in *Potts v. Johnson*, 654 So. 2d 596 (Fla. 3d DCA 1995), affirmed the propriety of Detective Pedraja's actions:

> A police officer in the scope of his duties may approach a suspect's front door and knock in an attempt to talk to that suspect. *See United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976); *Younger v. State*, 433 So. 2d 636 (Fla. 5th DCA), rev. denied, 440 So. 2d 354 (Fla. 1983). Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where a salesman or visitor may appear at any time. *State v. Morsman*, 394 So. 2d 408, 409 (Fla. 1981).

Id. at 599.

Further, the smell of marijuana emanating from Defendant's home was sufficient for Detective Pedraja to establish probable cause. In *State v. Betz*, 815 So. 2d 627 (Fla. 2002), the Florida Supreme Court cited a passage from the United States Supreme Courts decision in *Brinegar v. United States*, 338 U.S. 160, 175-76, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949)(*quoting Carroll*, 267 U.S. at 162):

> Probable cause exists where the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy

> information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Betz, 815 So. 2d at 633. The *Betz* Court interpreted the above as follows:

> Applying this principle, we conclude that the police officer here had probable cause to search both the passenger compartment and the trunk of Betz's automobile. First, of course, Officer Harrold smelled Aa very strong odor of marijuana coming directly out of the respondent's car window. As the odor of previously burnt marijuana certainly warranted a belief that an offense had been committed, this unquestionably provided the police officers on the scene probable cause to search the passenger compartment of the respondent's vehicle. *See Ross*, 456 U.S. at 825; *see also State v. Reed*, 712 So. 2d 458, 460 (Fla. 5th DCA 1998) (To a trained and experienced police officer, the smell of cannabis emanating from a person or a vehicle

> gives the police officer probable cause to search the person or the vehicle.).

Id. Applying the *Betz* Courts holding to the facts here, Detective Pedraja established probably because by walking toward Defendant's house on the sidewalk and immediately smelling marijuana while standing in front of the premises.

As previously explained, Detective Pedraja was permitted to approach the front door of Defendant's home as the defendant did not have a reasonable expectation of privacy regarding his front yard and, once there, established probable cause by smelling marijuana. Courts have described the probable cause Detective Pedraja established here as the plain smell doctrine. The Tenth Circuit relied upon the plain smell doctrine in *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

In *Angelos*, law enforcement officials received a tip from the defendant's former girlfriend that the defendant was hiding drugs, firearms, and money at a home he was renting. A search warrant was issued permitting law enforcement officials to seize marijuana, other indicia of narcotics in the trunk of the defendant's BMW, and the a safe located in the basement of the residence containing drugs, firearms, and money. When law enforcement officers executed

the search warrant, they first conducted a protective sweep of all three floors of the house in order to ensure their safety. Upon entering the basement, the officers immediately detected a strong odor of raw marijuana. The odor seemed to be emanating from approximately eighteen large duffle bags that were in plain view. When the officers looked more closely at the duffle bags, they observed small amounts of marijuana residue on the exterior of the bags. Accordingly, the officers seized those bags. Six similar duffle bags that also smelled of raw marijuana were located in plain view in the garage of the house and seized by the officers. The defendant moved to suppress the items seized from the house and, after conducting an evidentiary hearing, the district court denied the defendant's motion. On appeal, the 10th Circuit determined that the trial court did not err in denying the motion to suppress:

> The plain view doctrine allows a law enforcement officer to seize evidence of a crime, without violating the Fourth Amendment, if (1) the officer was lawfully in a position from which the object seized was in plain view, (2) the objects incriminating character was immediately apparent (i.e., there was probable cause to believe it was contraband or evidence of a crime), and (3) the officer had a lawful right of

access to the object. *United States v. Thomas*, 372 F.3d 1173, 1178 (10th Cir. 2004); *see Horton v. California*, 496 U.S. 128, 136-37, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). The plain smell doctrine, in turn, Ais simply a logical extension of the plain view doctrine .... *App.* at 102; *e.g.*, *United States v. Rhiger*, 315 F.3d 1283, 1290 (10th Cir. 2003) (concluding that various factors, including agents detection of strong odor of cooking methamphetamine, justified warrantless search); *United States v. Clayton*, 210 F.3d 841, 845 (8th Cir. 2000) (concluding that officer executing arrest warrant Aquickly developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production); *United States v. Haley*, 669 F.2d 201, 203 (4th Cir. 1982) (concluding that the odor given off by a container can justify invocation of the plain view doctrine). Here, the district court found, and *Angelos* does not dispute, that the officers executing the search warrant (1) were lawfully in the Fort Union house, (2) had lawful authority to conduct a protective sweep of the

> entire premises, including the garage and basement, (3) smelled a strong odor of raw marijuana coming from duffle bags in the basement and garage, all of which were in plain sight, and (4) observed residue of marijuana on the duffle bags in the basement. We conclude these circumstances, considered together, clearly justified the seizure of the duffle bags.

Id. at 748. The *Angelos* opinion demonstrates that Detective Pedraja established probable cause under the plain smell doctrine.

The Seventh Circuit ruled similarly in *United States v. French*, 291 F. 3d 945 (7th Cir. 2002):

> In the past we have held that public drives, sidewalks, or walkways (even those which lead to a rear side door) are not within the curtilage of the home when they are not enclosed by a gate or fence. *See, e.g., United States v. Evans*, 27 F.3d 1219 (7th Cir. 1994) (FBI agent who had plain view of the interior of defendant's home from the defendant's driveway had not made his observation from within the homes

> curtilage); *see also United States v. Smith*, 783 F.2d 648 (6th Cir. 1986) (officer who drove 70 feet up a private drive and observed marijuana plants two feet away from defendants house did not violate the homes curtilage); *United States v. Ventli*, 678 F.2d 63 (8th Cir. 1982) (officer who photographed tire tracks on private driveway and around the front porch of a rural home did not invade the homes curtilage). In *Evans* we noted that it is not objectionable for an officer to come upon that part of [private] property, which has been opened to public common use. The route which any visitor or delivery man would use is not private in the Forth Amendment sense, and thus if police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open. *Evans*, 27 F.3d at 1229 (*quoting* 1 W. LaFave, Search and Seizure ' 2.3(e), at 407 (1987)) (internal quotations omitted).

Id. at 953. As Detective Pedraja was permitted to approach Defendant's front door and was permitted to establish probable cause by any odors he smelled there, Detective Pedraja established

probable cause by immediately smelling marijuana while standing in front of the premises.

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341 (1914), and of testimony concerning knowledge acquired during an unlawful search, *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint," *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939). *See Wong Sun v. United States*, 371 U.S. 471, 484-485, 83 S.Ct. 407,415-16, 9 L.Ed.2d 441 (1963).

However almost simultaneously as the United States Supreme Court has developed the exclusionary rule, in the first quarter of this century, the court has also developed "independent source" doctrine. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). The Court has described the "independent source" doctrine, which has been applied to evidence acquired not only through

Fourth Amendment violations but also through Fifth and Sixth Amendment violations, as follows:

> "[T] he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred.... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984)

The exclusionary rule is not applicable if police discovered the evidence through a source independent of the illegal search or seizure. Obviously, the exclusionary rule has scant deterrent effect when police acquire the evidence through a separate, lawful source, not by exploiting the illegality.

The phrase "independent source" is used in both "a more general and a more specific sense":

> The more general sense identifies all evidence acquired in a fashion untainted by the illegal evidence-gathering activity. Where an unlawful entry has given investigators knowledge of facts x and y, by fact z has been learned by other means, fact z can be said to be admissible because derived from an "independent source." See *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380 (1984)

In *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380 (1984) law enforcement officer were acting on information that petitioners probably were trafficking in cocaine from their apartment, New York Drug Enforcement Task Force agents began a surveillance of petitioners. Thereafter, upon observing petitioner Colon deliver a bulky package to one Parra at a restaurant parking lot, while petitioner Segura and one Rivudalla-Vidal visited inside the restaurant, the agents followed Parra and Rivudalla-Vidal to their apartment and stopped them. Parra was found to possess cocaine, and she and Rivudalla-Vidal were immediately arrested. After being advised of his constitutional rights, Rivudalla-Vidal admitted that he had purchased the cocaine from petitioner Segura and confirmed that petitioner Colon had made the delivery at the restaurant.

Task Force agents were then authorized by an Assistant United States Attorney to arrest petitioners, and were advised that a search warrant for petitioners' apartment probably could not be obtained until the following day but that the agent should secure the premises to prevent destruction of evidence. Later that same evening, the agents arrested petitioner Segura in the lobby of petitioners' apartment building, took him to the apartment, knocked on the door, and, when it was opened by petitioner Colon, entered the apartment without requesting or receiving permission. The agents then conducted a limited security check of the apartment and in the process observed, in plain view, various drug paraphernalia. Petitioner Colon was then arrested, and both petitioners were taken into custody. Two agents remained in the apartment awaiting the warrant but because of "administrative delay" the search warrant was not issued until some 19 hours after the initial entry into the apartment. In the search pursuant to the warrant, the agents discovered, inter alia, cocaine and records of narcotics transactions. These items were seized, together with those observed during the security check. The District Court granted petitioners' pretrial motion to suppress all the seized evidence.

The Court of Appeals held that the evidence discovered in plain view on the initial entry, but not the evidence seized during the warrant search,

must be suppressed. Petitioners were subsequently convicted of violating federal drug laws, and the Court of Appeals affirmed. The petitioners appealed to the United States Supreme Court. The United Supreme Court ruled that exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939)

The exclusionary rule does not apply, however, if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," ibid., as, for example, where the police had an "independent source" for discovery of the evidence. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182.

In *Segura v. United States*, 468 U.S. 796, 104 S. Ct. 3380 (1984), there was an independent source for the challenged evidence; the evidence was discovered during a search of petitioners' apartment pursuant to a valid warrant. The information on which the warrant was secured came from sources wholly unconnected with the initial entry and was known to the agents well before that entry. Hence, whether the initial entry was illegal or not is irrelevant to the admissibility

of the evidence, and exclusion of the evidence is not warranted as derivative or as "fruit of the poisonous tree," and is admissible pursuant to an "independent source" See: *United States v. Wade*, 388 U.S. 218, 240-242, 87 S.Ct. 1926, 1939-40, 18 L.Ed.2d 1149 (1967); *Costello v. United States*, 365 U.S. 265, 280, 81 S.Ct. 534, 542, 5 L.Ed.2d 551 (1961); *Nardone v. United States, supra,* at 341, 60 S.Ct., at 267.

In *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529 (1988), federal agents entered a warehouse and observed a large quantity of marijuana. The entry was unlawful. The agents then secured a search warrant by were careful not to mention their unlawful entry or otherwise taint the probable cause basis. In returning to the warehouse a second time, agents entered with the warrant and seized the marijuana The Supreme Court upheld the seizure:

> "So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession), there is not reason why the independent source doctrine should not apply"

In the case at bar, the court should conclude that the "independent source" rule would be applicable in this case based on the facts that detective William Pedraja, testified in the motion to suppress, that he has had several years of training and experience and based on the smell of marijuana, the shades to the house being drawn and the continual running of an air conditioning unit without cycling were all indications that the house located at 13005 SW 257 Terrace, Miami, Florida was a marijuana hydroponics laboratory, which would have been sufficient probable cause for a search warrant of the residence.

It should also noted that this trial court has also issued a search warrant for a residence, were the probable cause for the warrant was the officer smelling the odor of marijuana, the shades to the house being drawn, and the continual running of an air conditioning unit without cycling, in *State v. Ramize*, F05033378. The defendant in *State v. Ramize*, filed an appeal, on the issue that the detective in that case did not have sufficient probable cause for the warrant, the Third district court of appeal has upheld the court ruling in denying the defendant motion in *State v. Ramize*, 954 So.2d 754 (3rd DCA).

B. Introduction of the Drug-Detection Canine Outside Defendant's House Did Not Violate Fourth Amendment

As to whether police violated Defendant's Fourth Amendment rights regarding the introduction of a narcotics canine outside Defendant's front door and garage door, significant case law demonstrates that a canine sniff does not violate the Fourth Amendment. In *United States v. Brock*, 417 F.3d 692 (6th Cir. 2005), a team of federal and state law enforcement officers executed a federal search warrant at the defendant's residence, 3375 Payton Avenue in Indianapolis, Indiana (3375"). The officers discovered, *inter alia*, substantial quantities of narcotics. The defendant was not present during the search, but three individual s were found in the home. Police placed handcuffs on these individuals, and after informing them of their Miranda rights, proceeded to question them. One of the individuals told police that he lived next door at 3381 Payton Avenue (3381"), and that he watched over both houses. He gave the police a key to 3381 and consented to a search of the common areas of that residence. He informed police that the defendant rented a room at 3381 and used it as a stash house. After receiving this information from this individual, police obtained a search warrant for the entire 3381 residence. The house at 3381 Payton Avenue consisted of a kitchen, a living room, and three separate locked bedrooms. One bedroom in the southwest comer of the residence had a pile of clothes directly in front of the locked door and a sign on the door stating: Stay Out. David. A canine

officer with a drug-sniffing dog responded to the outside of the locked bedroom door. The canine alerted police to the presence of narcotics while sniffing just outside the defendant's locked bedroom door. At trial, the defendant moved to suppress the contraband discovered through the narcotics canine:

> At oral argument, the government relied primarily on the Supreme Courts recent decision in *Illinois v. Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005), issued after the parties submitted their briefs in this case. The Court held in *Caballes* that a dog sniff of a vehicle during a traffic stop, conducted absent reasonable suspicion of illegal drug activity, did not violate the Fourth Amendment because it did not implicate any legitimate privacy interest. Id. at 837-38. The Court explained that, because there is no legitimate interest in possessing contraband, the use of a well-trained narcotics-detection dog that Aonly reveals the possession of narcotics compromises no legitimate privacy interest and does not violate the Fourth Amendment. Id. (*quoting Jacobsen*, 466 U.S. at 1 23).

Caballes relied on the Courts opinion in *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), which held that a canine sniff of a travelers luggage in the airport was not a search within the meaning of the Fourth Amendment because the information obtained through this investigative technique revealed only the presence or absence of narcotics. As the Court explained,

> the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.

Id. at 707. Adhering to this reasoning, the Court held in Jacobsen that a chemical field test of a substance found inside a package was not a Fourth Amendment search because the test Amerely discloses whether or not a particular substance is cocaine. 466 U.S. at 123. As there is no legitimate interest in possessing cocaine, the field test did not compromise any legitimate privacy interest. Id.; *see also Indianapolis v.*

Edmond, 531 U.S. 32, 40, 148 L. Ed. 2d 333, 121 S. Ct. 447 (2000) (officers practice of walking a narcotics-detection dog around the exterior of each car at a drug interdiction checkpoint does not transform the seizure into a search).

Defendant tries to distinguish these cases on the ground that he has a far greater privacy interest inside his home, particularly inside the bedroom, than one has in a public space or even a car. He relies on the Courts decision in *Kyllo*, which held that the use of a thermal-imaging device to detect relative amounts of heat within a private home was a Fourth Amendment search and must be supported by probable cause and a warrant. In *Kyllo*, the Court held that where the government uses Aa device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant. Id. at 40.

Kyllo does not support defendant's position. The *Kyllo* Court did reaffirm the important privacy interest in one's home. *See* id. at 37 (In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.). However, as the Court subsequently explained in *Caballes*, it was essential to *Kyllos* holding that the imaging device was capable of detecting not only illegal activity inside the home, but also lawful activity, including such intimate details as at what hour each night the lady of the house takes her daily sauna and bath. *Caballes*, 125 S. Ct. at 838 (quoting *Kyllo*, 533 U.S. at 38). As the Court emphasized, an expectation of privacy regarding lawful activity is categorically distinguishable from ones hopes or expectations concerning the non-detection of contraband in the trunk of his car. Id. Based on this reasoning, we hold that the dog sniff inside Brocks residence was not a Fourth Amendment search because it detected only the presence of contraband and did not provide any information about lawful activity over

> which Brock had a legitimate expectation of privacy.

Id. at 695-696. Similarly here, the narcotics canine sniff outside Defendant's house detected only the presence of contraband and did not provide any information about lawful activity over which the defendant had a legitimate expectation of privacy.

This issue was considered by the Court of Appeals of Maryland in *Fitzgerald v. State*, 384 Md. 484, 864 A.2d 1006 (Md. 2004). The *Fitzgerald* Court ruled that a dog sniff outside a private residence was not a search, relying upon decisions from the Sixth Circuit and the States of New York and Texas:

> Other courts considering the issue under the Fourth Amendment have concluded that a sniff of the exterior of a residence is not a search. In Dunn, the police received information that Dunn stored narcotics in his apartment. The police brought a trained dog to sniff the door from the common hallway. The dog alerted, the police obtained a search warrant, and the police found narcotics and other paraphernalia. *Dunn*, 564 N.E.2d at 1055. The court rejected Thomas explicitly and held that *Place* and

> *Jacobsens* rationales dictated that canine sniffs of residences are not searches under the Fourth Amendment. Id. at 1056-57. *See also Reed*, 141 F.3d at 650 (holding that a canine sniff of the inside of an apartment was not a search when the canine team was lawfully present in the building); *United States v. Tarazon-Silva*, 960 F. Supp. 1152, 1162 (W.D.Tex. 1997) (holding that a dogs sniffing of the outside of a residence and alerting to a dryer vent was not a search when the dog and police officer had a Aright® to be positioned alongside the residences); *Rodriguez v. State*, 106 S.W.3d 224, 228-29 (Tex. App. 2003) (holding based on *Place*, *Jacobsen*, and *Porter*, *infra*, that a dog sniff of the outside of a residence is not a search); *Porter v. State*, 93 S.W.3d 342, 346-47 (Tex. App. 2002) (holding that a dog sniff of a residences front door is not a search under *Jacobsens* rationale and rejecting *Kyllos* applicability).

Id. at 503.

The defense in the case at bar has relied upon the Fourth Districts decision in *State v.*

Rabb, 881 So. 2d 587 (Fla. 4th DCA 2004)(Rabb I), *vacated, Florida v. Rabb*, 544 U.S. 1028, 161 L. Ed. 2d 1051, 125 S. Ct. 2246 (2005)(Rabb II), *decision on remand, State v. Rabb*, 2005 Fla. App. LEXIS 14430 (Fla. 4th DCA 2005)(Rabb III), *substituted opinion at, opinion withdrawn by, rehearing denied by, rehearing en bane, denied by State v. Rabb*, 920 So. 2d 1175, (Fla. 4th DCA 2006)(*Rabb* IV). In *Rabb*, an anonymous source called the Broward Sheriffs Office and stated that the defendant had cannabis grow operation in his residence. Police initiated surveillance on the residence, saw the defendant exit the residence, and entered a car. The defendant was lawfully pulled over by police due to a traffic infraction. Police observed two cannabis cultivation books and one cannabis cultivation video on the front driver's seat of the vehicle in plain view. The defendant was asked if he had cannabis grow operation inside the residence, and he refused to answer. The defendant stated he had cannabis cultivation books because he was just interested in cannabis cultivation. A drug detection dog alerted police to the defendant's car, and police recovered one cannabis cigarette from the ashtray. Police also recovered additional cannabis inside of his the defendant's left shoe/sock.

Later, a drug detection dog was taken to the front of the defendant's residence. The drug detector dog walked from the public roadway in

front of the residence, up to the front door, and alerted police to the presence of narcotics. Furthermore, two police detectives walked to the front door of the residence and could smell the odor of cannabis emitting from the residence. Based on the information provided by the confidential source, the cultivation of cannabis books and video's located in Mr. Brown's vehicle, the cannabis located in Mr. Brown's vehicle as well as his person and the drug detector dog alert on the residence, the affiant believed that a cannabis growing operation was located inside the residence. Based on this affidavit, a search warrant was issued for the defendant's house where police discovered significant quantities of contraband including 64 cannabis plants.

In *Rabb I*, the Fourth District held that the trial court did not err by granting the defendant's motion to suppress where the marijuana seized was initially discovered by a dog sniff at the exterior of his house because the defendant had a reasonable expectation of privacy that was violated by the use of the dog sniff. In *Rabb II*, the United State Supreme Court vacated the Fourth Districts decision and ordered further consideration in light of *Illinois v. Caballes*, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005). In *Rabb IV*, the Fourth District held that *Caballes* did not change the result reached in *Rabb I*. In *Caballes*, a dog sniff was performed on the exterior of the defendant's

car while he was lawfully seized for a traffic violation. The *Caballes* Court held that the use of a well-trained narcotics-detection dog--one that does not expose non-contraband items that otherwise would remain hidden from public view--during a lawful traffic stop, generally does not implicate legitimate privacy interests. The *Rabb IV* Court wrote:

> The United States Supreme Court has yet to address the intersection of the logic of *Caballes* and *Place* with the historical protection of the home and *Kyllo*. Just as *Kyllo* did not pass on the constitutional permissibility of thermal scans of vehicles, *Caballes* did not pass on the constitutional permissibility of dog sniffs of houses. *See Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (Souter, J., dissenting) (AThe Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dogs walk around a stopped car.). n5 In a situation-sensitive Fourth

> Amendment world, this is all the difference.

Id. at 1192.

The Fourth Districts analysis misinterpreted the precedent of the United States Supreme Court. In *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), the defendant's behavior aroused the suspicions of law enforcement officers as he waited in line at the Miami International Airport to purchase a ticket to New York's LaGuardia Airport. As the defendant proceeded to the gate for his flight, the agents approached him and requested his airline ticket and some identification. He complied with the request and consented to a search of the two suitcases he had checked. Because his flight was about to depart, however, the agents decided not to search the luggage. Prompted by the defendant's parting remark that he had recognized that they were police, the agents inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Further investigation revealed that neither address existed and that the telephone numbers the defendant had given the airline belonged to a third address on the same street. On the basis of their encounter with the defendant and this information, the Miami agents called Drug Enforcement Administration (DEA) authorities in New York to relay their information.

When the defendant arrived at LaGuardia, two DEA agents were waiting for him. There again, his behavior aroused the suspicion of the agents. After he had claimed his two bags and called a limousine, the agents decided to approach him. They identified themselves as federal narcotics agents, to which the defendant responded that he knew they were cops and had spotted them as soon as he had deplaned. One of the agents informed the defendant that based on their own observations and information obtained from the Miami authorities, they believed that he might be carrying narcotics. The defendant refused to consent to a search of his luggage. One of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that the defendant was free to accompany them. The agents then took the bags to Kennedy Airport, where they subjected the bags to a Asniff test by a trained narcotics detection dog. The dog reacted positively to the smaller of the two bags but ambiguously to the larger bag. Approximately 90 minutes had elapsed since the seizure of respondent's luggage. Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a Magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine. The *Place* Court wrote:

A canine sniff by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose non- contraband items that otherwise would remain hidden from public view, as does, for example, an officers rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by

> the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here -- exposure of respondent's luggage, which was located in a public place, to a trained canine -- did not constitute a Asearch@ within the meaning of the Fourth Amendment.

Id. at 707.

Later, the United States Supreme Court confronted a similar situation in *United States v. Jacobsen*, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984). During their examination of a damaged package, the employees of a private freight carrier observed a white powdery substance, originally concealed within eight layers of wrappings. They summoned a federal agent, who removed a trace of the powder, subjected it to a chemical test and determined that it was cocaine. The question presented to the United State Supreme Court was whether the Fourth Amendment required the agent to obtain a warrant before he did so. The *Jacobsen* Court further explained the *Place* holding:

> canine sniff by a well-trained narcotics detection dog, however, does not require opening the luggage. It does

> not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, an officers rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. *Id.*, at 707.
>
> Respondents attempt to distinguish *Place*, arguing that it involved no physical invasion of Places effects, unlike the conduct at issue here. However, as the quotation makes clear, the *reason* this did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about non-contraband items. That rationale is fully applicable here.

Id. at 124. The *Jacobsen* holding provides that *Place* stood for proposition that a legitimate

expectation of privacy cannot be violated when the governmental conduct could reveal nothing about non-contraband items. The issue, as *Jacobsen* makes clear, is whether the government activity has the possibility of revealing something other than contraband. A dog sniff Adiscloses only the presence or absence of narcotics, a contraband item. *Place*, 462 U.S. at 707. Thus, the precedent announced in Place as the dog sniff only disclosed the presence of contraband inside Defendant's home covered the dog sniff outside of Defendant's house.

Lastly, the Fourth District incorrectly interpreted the decision it was expressly instructed to consider in *Rabb II*. In *Caballes*, a state trooper stopped the defendant for speeding on an interstate highway. When the state trooper radioed the police dispatcher to report the stop, a second trooper and member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, the defendant's car was on the shoulder of the road and the defendant was in the first state trooper's vehicle. While the first state trooper was in the process of writing a warning ticket, the second state trooper walked his dog around the defendant's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent.

The *Caballes* Court ruled that the use of the narcotics-detection dog did not implicate legitimacy privacy interests. The Court noted:

> Respondent likewise concedes that drugs sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband. Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument.

Id. at 409. Likewise here, any claim regarding error rates in drug-detection dogs revealing private information is foreclosed by the absence of any evidence to support this argument.

The *Rabb IV* Court distinguished *Caballes* because the facts in *Caballes* did not involve the drug sniff outside a private home. The *Rabb IV* Court wrote:

> Upon consideration of *Caballes*, we re-affirm the trial courts order granting Rabbs motion to suppress. In this case, unlike *Caballes*, the intrusion on

> privacy expectations does rise to the level of a Aconstitutionally cognizable infringement. At the end of the analysis, the Fourth Amendment remains decidedly about a place, and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life. If that line should crumble, one can only fear where future lines will be drawn and where sniffing dogs, or even more intrusive and disturbing sensory-enhancing methods, will be seen next.

The concluding paragraph in *Caballes* demonstrates the error in the *Rabb IV* decision:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity--in that case, intimate details in a home, such as

> Aat what hour each night the lady of the house takes her daily sauna and bath. *Id.*, at 38, 150 L. Ed. 2d 94, 121 S. Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the non-detection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Id. at 409-410. As previously stated, Detective Pedraja was permitted to approach the front door of Defendant's house. Similarly to items in plain view, items detected by smell are sufficient to establish probable cause. And, whether the government activity was outside a private home or outside an automobile on a public road, the issue was whether the government activity had the possibility of revealing something other than contraband.

In *Kyllo*, police flew over the defendant's home and used a thermal imaging device to scan

the home to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth. The Court held that police violated the Fourth Amendment because they were able to discover how warm the defendant was keeping his residence. The *Kyllo* Court focused on the impropriety of police gaining access to this intimate detail. No such concern existed here as the dog sniff only revealed the presence of contraband and did not reveal any intimate details of Defendant's life.

Lastly, Judge Gross eloquently worded and reasoned dissent in *Rabb IV* is persuasive. Judge Gross wrote:

> The majority fails to grasp the importance of the two concepts central to *Place*, *Jacobsen*, and *Caballes*. There is no legitimate expectation of privacy in the odor of contraband; a well-trained dog will alert only to contraband, and not to odors or other things protected by the Fourth Amendment. This is not a case where the defendant challenged the dogs training or experience. The majority's misunderstanding is evident from the statement that a dogs sense of smell crossed the firm line of Fourth

> Amendment protection at the door of Rabb's house. Rather, it was the constitutionally unprotected odor of contraband that crossed the threshold of the home to the dogs nose, which sniffed from a place open to the public.

Id. at 1199. And, Judge Gross dismissed *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), where the Second Circuit held that a dog sniff of odors emanating from a residential apartment constituted a Fourth Amendment search, as an opinion that few if any courts have followed:

> The problem with *Thomas* is that it is unsound; the opinion has met with the universal disapprobation of all the federal circuit and district courts that have considered it." *Fitzgerald*, 837 A.2d at 1031; *See also United States v. Reed*, 141 F.3d 644, 649-50 (6th Cir. 1998) (stating that Thomas ignored the Supreme Courts determination in Place that a person has no legitimate expectation of privacy in the possession of contraband, Athus rendering the location of the contraband irrelevant to the Courts holding that a canine sniff does not constitute a search); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir.

1997) (finding that a dog sniff of a common hotel corridor was not a search); *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993) (reasoning that Thomas conflicts with Supreme Court authority and rests on an incorrect statement of law); *United States v. Colyer*, 278 U.S. App. D.C. 367, 878 F.2d 469, 474-76 (D.C. Cir. 1989) (determining that the appellant's reliance of the *Thomas* decision was unavailing and noting the cases correctness has been called into question); *United States v. Hogan*, 122 F. Supp. 2d 358, 369 (E.D.N.Y. 2000) (following *Thomas*, but commenting that the case appears to be at odds with *Place* and *Jacobsen*); *United States v. Sklar*, 721 F. Supp. 7, 14 (D. Mass. 1989) (observing that a dwelling-like expectation of privacy is not justified when it is asserted with respect to contraband); *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 1056-57, 563 N.Y.S.2d 388 (N.Y. 1990) (holding that canine sniff is not a search under the Fourth Amendment); *State v. Smith*, 327 Ore. 366, 963 P.2d 642, 647 (Or. 1988) (observing that *Thomas* Awould appear to be questionable law); *Rodriguez v. State*,

> 106 S.W. 3d 224, 228-29 (Tex. Crim. App. 2003) (same); *Porter v. State*, 93 S.W. 3d 342, 346-47 (Tex. Crim. App. 2002) (same); *United States v. Tarazon-Silva*, 960 F. Supp. 1152, 1162-63 (W.D. Tex. 1997) (holding that a dog sniff of the dryer vent of house was not a search).

Id. at 1200. As previously stated, Detective Pedraja were permitted to approach the front door of Defendant's house. Similarly to items in plain view, items detected by smell are sufficient to establish probable cause. And, whether the government activity was outside a private home or outside an automobile on public road, the issue was whether the government activity had the possibility of revealing something other than contraband. A dog sniff discloses only the presence or absence of narcotics, a contraband item. *Place*, 462 U.S. at 707.

While the search warrant here contained information other than Detective Pedraja's smell of the marijuana, the fact that Detective Pedraja had established probable cause through his sense of smell permits this Court to excise the remaining information. As the Florida Supreme Court wrote in *Terry v. State*, 668 So. 2d 954 (Fla. 1996),

> If the affidavit causing a warrant to issue contains intentionally and knowingly or recklessly false statements, the court must excise the falsity from the affidavit and review the remainder of the affidavit to determine whether there remained sufficient grounds to establish probable cause. *Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978). If the remaining statements in the affidavit are sufficient to establish probable cause, the erroneous statement does not invalidate the search warrant. *Blair v. State*, 406 So. 2d 1103, 1106 (Fla. 1981). If the false statement is necessary for probable cause, the search warrant must be voided and the fruits of the search excluded. *Franks*, 438 U.S. at 156.

Id. at 958. The Florida Supreme Court ruled similarly in the earlier case of *Neary v. State*, 384 So. 2d 881 (1980):

> The law is clear that a search warrant is not invalidated by inclusion of illegally obtained evidence in the supporting affidavit where the affidavit contains other valid

> allegations sufficient to establish probable cause. Thus, the critical question is whether the independent and lawful information stated in the affidavit suffices to show probable cause.

Id. at 884. Therefore, even if it were decided that police infringed upon Defendant's Fourth Amendment rights by permitting a canine sniff outside Defendant's front door and garage, the information gained by the canine smell should be excised from the warrant. The warrant would then remain valid as probable cause was established by Detective Pedraja's sense of smell coupled with his vast narcotics training and experience.

C. THE EVIDENCE OF THE MARIJUANA IS ADMISSABLE UNDER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE AUTHORIZED BY *UNITED STATES V. LEON*, 468 U.S. 897, 104 S. CT. 3405 (1984)

To further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant, *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091 (1984). the reviewing court must use a deferential standard of review with respect to the magistrate's decision to issue a search warrant. *United States v. Leon*, 468 U.S. 897, 104 S. Ct.

3405 (1984), *Massachusetts v. Upton*, 466 U.S. 727, 104 S. Ct. 2085 (1984); *United States v. Brudidge*, 170 F.3rd 1350 (11th Cir. 1999); *State v. Howard*, 666 So.2nd 592, (Fla. Dist. Ct. App. 4th Dist. 1996). Moreover, under the good faith exception to the exclusionary rule, tangible evidence obtained in reasonable reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective is admissible in the prosecution's case-in-chief. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984), Thus, the good-faith exception applied, even though the affidavit supporting the warrant did not demonstrate probable cause that the law was then being violated and was therefore invalid, where there were no false statements or representations in the affidavit, and the officers' reliance on the magistrate's determination of probable cause was objectively reasonable.

In *United States v. Leon*, 468 U.S. 897, 104 S. Ct 3405, (1984), the United States Supreme Court carved out an exception to the exclusionary rule holding that suppression of evidence obtained pursuant to a search warrant was not justified in cases where evidence is obtained pursuant to a police officer's objectively reasonable reliance on a magistrate's determination of probable cause even where the search warrant is ultimately found to be unsupported by probable cause. The *Leon* court retained the rule set forth in *Franks v. Delaware*,

438 U.S. 154, 98 S. Ct. 2674, (1978), which held that suppression remained an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.

In *Johnson v. State*, 872 So.2d 961 (4th DCA, 2004) the court held that the test for good faith, for purpose of determining whether a search warrant qualifies for the good faith exception to the exclusionary rule, is whether a reasonably trained officer would have known that the search was illegal despite the magistrate's authorization.

The facts in the case at bar, is that Detective Pedraja observed at the residence 13005 SW 257th Terrance the following elements that would give him the probable cause for a search warrant, the continual running of an air conditioning unit without recycling, the shade being drawn over the windows, the smell of odor of live marijuana plants, and the K-9 alerting to the odor of the control substance.

Detective Pedraja testified that in the past he has drafted similar affidavits for search warrants in the past, and had them signed by other on-call duty judges, and in fact this search warrant was signed by a judge.

The test for this court to consider is whether a reasonably trained officer would have known that the search was illegal despite the magistrate's authorization. It is the state's position that Detective Pedraja training and previous experience did give him the good faith belief that there was nothing illegal about his warrant and that the magistrate signature was appropriate. And as such *United States v. Leon*, 468 U.S. 897, 104 S. Ct 3405, (1984), is applicable in this case, and the court should deny the defendant's under the good faith exception to the exclusionary rule.

CONCLUSION

Based on the foregoing, the defendant's motion for suppression of the physical evidence should be denied.

Respectfully submitted,

KATHERINE FERNANDEZ RUNDLE
STATE ATTORNEY

BY: /s/
Marcus Griggs
Assistant State Attorney
Florida Bar 0696021
1350 Northwest 12th Avenue
Miami, Florida 33136-2111
(305) 547-0100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing State's Response to Defendant's Motion for Suppression of Physical Evidence was e-mailed/ mailed this 11th day of June 2007, to Assistant Public Defender Brett Steinberg, Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125.

/s/
Marcus Griggs
Assistant State Attorney

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

Case No. F06-40839

vs.

JUDGE THOMAS

JOELIS ALEX JARDINES,
Defendant

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS ITEMS SEIZED FROM HIS HOUSE

THIS CAUSE having come before this Court on Defendant, JOELIS ALEX JARDINES', motion to suppress evidence seized from his house and this Court having reviewed the motion, the arguments of counsel, the court file and records in this case, and being otherwise fully advised in the premises therin:

A drug detector dog was used to support probable cause for the issuance of a search warrant of the Defendant's house. The Defendant moved to suppress the evidence of drugs recovered from his house as a result of the search warrant. Pursuant to *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006), this Court concludes that law enforcement's

use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search.

However, the Court must also consider, absent the dog sniff information, whether any independent and lawfully obtained evidence establishes a substantial basis for concluding that probable cause existed to support the issuance of a search warrant for the Defendant's house.

The probable cause affidavit listed the information provided from a crime stoppers tip that marijuana was being grown at the residence as a basis to support probable cause for the issuance of a search warrant. However, the crime stoppers tip was unverified and came from an unknown individual rather than a qualified confidential informant. Additionally, there was no evidence to suggest the crime stoppers tip was corroborated by any evidence resulting from surveillance of the house. The only other evidence contained in the affidavit was that the window blinds were closed and the air conditioner unit was constantly running without recycling. This information, considered in its totality, simply does not suggest a fair probability of any broader criminal activity, such as the growing of marijuana in the Defendant's house.[1] Therefore, this Court

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[1] There was evidence that after the drug detection dog had alerted to the odor of a controlled substance, the

concludes that no independent and lawfully obtained evidence establishes the probable cause necessary to support the issuance of a search warrant for the Defendant's house.

ORDERED AND ADJUDGED that even with great deference afforded to the search warrant for the Defendant's house in this case, the probable cause affidavit did not provide a "substantial basis for concluding that probable cause existed. Therefore, the motion to suppress evidence seized from the Defendant's house is GRANTED

The parties are hereby notified that they have the right to appeal this order to the District Court of Appeal of Florida, Third District, within thirty(30) days of the signing and filing of this order.

DONE AND ORDERED in Miami-Dade County, Florida, on this *13* day of June, 2007.

/s/
HONORABLE WILLIAM THOMAS
CIRCUIT JUDGE

---

officer also detected a smell of marijuana plants emanating from the front door. However, this information was only confirming what the detection dog had already revealed.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR MIAMI-DADE COUNTY, FLORIDA
CASE NO. FOG-40839

STATE OF FLORIDA,
Plaintiff,

vs.

JOELIS JARDINES,
Defendant.
----------/

Gerstein Justice Building

Miami, Florida

June 14, 2007

The above-entitled case came on for hearing before the Honorable WILLIAM THOMAS, as Judge of the Circuit Court, in court pursuant to notice.

APPEARANCES:

OFFICE OF THE STATE ATTORNEY
KATHERINE FERNANDEZ-RUNDLE
BY: IVETTE GONZALEZ, ASA
FOR THE DEFENDANT:
BRETT STEINBERG, APD

THURSDAY, JUNE 14, 2007, 9:47 A.M.

MR. STEINBERG: Good morning, Your Honor. Page 16, Jardines. He needs the services of the interpreter.

THE COURT: Madam Clerk, do you have a copy of the order?

MS. GONZALEZ: Judge, before you enter your order, Judge, also, I don't think I formally incorporated -- I know that we provided Your Honor with case law at the time we argued the motion, but I don't think I formally incorporated it into the court file and into the record and at this time I want to do so.

Specifically, throughout this argument the State relied on, or subsequent to the argument, the State also submitted this Court with Fitzgerald v State, United States v Brock, Nelson v State, Seguera v U.S. and Murry v U.S. and at this time I want to incorporate those cases into any arguments I may have made and make them part of the court file.

THE COURT: The Court having considered all the -- I reviewed the motions filed, the arguments of Counsel, the court file, and the records in this case and otherwise being fully advised, the Court is finding that the case of State

v Rabb, 920 So.2D 1175, 2006, applies to the facts of this case.

In that case the Court held that law enforcement's use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search.

The Court then considered whether or not, absent the dog-sniff information, independent and lawfully obtained evidence establishes a substantial basis for concluding that probable cause existed to support the issuance of the search warrant and the Court concluded that it did not.

Based upon that, the Court is going to grant the Defendant's Motion to Suppress items seized from the house and, State, make a decision on how you want to proceed and we can reset it.

MS. GONZALEZ: I would request that you reset it for next Wednesday and, also, Your, Honor can I just inquire with the Court.

I heard your order and my question then is Your Honor making any particular finding with respect to the State's third argument as far as Leon?

THE COURT: I just don't think it applies. I think that the -- I looked at the analysis in Rabb, and to be honest with you, I followed it to

a "T" and I just don't think Leon applies in the way that you argued it.

And the other thing I don't think, all the cases that you cited to me, I reviewed and they were so clearly distinguishable from what we have here.

I mean, I was looking for something -- the cases you gave me, some I thought were interesting because of how they analyzed it and I can see how it can go the other way.

But those cases were he rented a room, he was in a hotel room, he was -- you know, a lot of car cases and the like.

I just think that this case was -- Rabb was based upon a very limited and specific situation involving someone's home, not someone who was renting, not someone who was a guest, and I think that makes a difference, but let's see what the Third --

MS. GONZALEZ: And the only issue I see with that is, you know, how do you define a home? A home can be somebody in an apartment building just as much as a hotel could be.

THE COURT: There's case law that says that if I own a home and you rent a room in my home and the police show up in my home, and

they tell me that they believe that you are -- they suspect that there's drug activity or something -- you are renting a room inside this, but it's my hallway.

There are common areas that I have free assess to and I have an expectation of privacy that I can waive. The same thing with the motel, but the Third District Court of Appeals will deal with it.

I think you have done an excellent job in laying the record. It will be interesting what the Third ultimately does with it.

And I think you have indicated that the Third already has this issue on appeal already, and if they decide it prior to -- well, I don't know how that works.

MS. GONZALEZ: Time-wise.

THE COURT: Time-wise, I don't know how that will work. So, let's reset this for one week, for next Wednesday.

THE CALENDAR CLERK: 6-20.

MR. STEINBERG: Can I make a copy of your written order?

THE COURT: Yes.

THE CLERK: Since you signed the order yesterday, are you granting it as of today or yesterday?

THE COURT: I reviewed your motion yesterday.

THE CLERK: I just wanted to make sure.

THE COURT: If they need more time -- I mean, if you need more time to file your notice, just request it and I'll give you more time.

MS. GONZALEZ: I do want to move it along also.

(Proceedings concluded at 9:53 a.m.)

CERTIFICATE OF COURT REPORTER

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

I, BRYNN DOCKSTADER, Court Reporter for the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, in and for Dade County,

DO HEREBY CERTIFY, that I was authorized to, and did, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages constitute a true, accurate and correct computerized transcription of my report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Miami, Dade County, Florida, this 3rd day of September, 2007.

/s/
Brynn Dockstader, RMR

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

FILED
APR 2 9 2012
OFFICE OF THE CLERK

No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE STATE OF FLORIDA

PAMELA JO BONDI
Attorney General of Florida
Tallahassee, Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
COUNSEL FOR PETITIONER

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QUESTION PRESENTED

Whether a dog sniff at the front door of a suspected grow house by a trained drug-detection dog is a Fourth Amendment search requiring probable cause?

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No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE STATE OF FLORIDA

OPINIONS BELOW

The Florida Supreme Court's opinion is reported at *Jardines v. State*, 73 So. 3d 34 (Fla. 2011) (Pet. App. A-1–97). The Florida Supreme Court denied rehearing, in an unpublished order, on July 7, 2011. (Pet. App. A-98). The decision of the intermediate appellate court is reported at *State v. Jardines*, 9 So. 3d 1 (Fla. 3d Dist. Ct. App. 2008). (Pet. App. A-99–135). The trial court's order granting the motion to suppress is unreported. (Pet. App. A-136–139).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Florida Supreme Court issued its decision on April 14, 2011. The State filed a motion for rehearing. The Florida Supreme Court denied rehearing on July 7, 2011. The State of Florida sought, and was granted, an extension of time to file the petition for writ of certiorari. On October 26, 2011, the State of Florida timely filed the petition. This Court granted the petition on January 6, 2012, limited to the first question presented.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

After receiving a Crime Stoppers tip that a house in south Dade County was being used as a grow house, Miami-Dade Police Detective Pedraja[1] and a drug task force, including several agents of the United States Drug Enforcement Agency (DEA), conducted surveillance at 13005 SW 257 Terrace on the morning of December 5, 2006. (J.A. at A-44, 58).

That morning the task force was joined by canine officer Detective Bartlet and his well-trained drug-detection dog, Franky. Detective Bartlet had been a canine handler for three years and trained with Franky on a weekly basis.[2] At about 7 a.m.,

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[1] Detective Pedraja, a 17 year detective with the Miami-Dade Police Department, spent the last four years investigating and unearthing marijuana cultivators in urban environments. (J.A. at A-46, 76, 82).

[2] The affidavit prepared for the search warrant reflects that Detective Bartlet and Franky have "weekly maintenance training in accord with established Miami-Dade Police Department procedures, including controlled negative testing and distractor training, as well as continuing training in basic and advanced search techniques." (J.A. at A-54). As the record makes clear, at the time Franky was a very experienced, certified drug-detection dog, having completed approximately 656 narcotics detection tasks in the field and made approximately 399 positive alerts. Franky's positive alerts assisted authorities in the seizure of almost one million grams of marijuana (936,614 grams, including both ready for sale and live growing marijuana), 13,008

Detectives Bartlet and Pedraja walked up the driveway and front walkway of the house to the front door with Franky on a leash just ahead of them. As the trio approached the door, Franky began tracking the smell of contraband. Trained to go to the strongest point of the odor or the source, Franky alerted by sitting down immediately after sniffing the base of the front door. Detective Bartlet informed Detective Pedraja of Franky's alert and then returned to the car with Franky, where he prepared training information for use in securing a search warrant. After being at the scene for approximately ten minutes, Detective Bartlet and Franky left to assist with other cases. (J.A. at A-99).

Meanwhile, Detective Pedraja knocked several times on the front door but received no response. While at the front door, Detective Pedraja personally smelled the scent of live marijuana, which confirmed Franky's earlier alert. (J.A. at A-81). He also noticed that the house's air

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grams of cocaine, 2,638 grams of heroin, and 180 grams of methamphetamine. (J.A. at A-54).

Jardines did not challenge Franky's reliability in this case. He explicitly disclaimed any challenge to this particular dog's reliability; rather, he challenged the use of dogs in general. For that reason, the Florida Supreme Court did not address reliability unlike *Harris v. State*, 71 So.3d 756 (Fla. 2011), *cert. granted, Florida v. Harris*, · S.Ct. · (March 26, 2012)(No. 11-817), where the issue became the credibility of the dogs credentials.

conditioner was constantly running for fifteen minutes. (J.A. at A-82–83). Detective Pedraja's suspicions stemmed from his four years of experience dealing with hydroponic grow lab cases. (J.A. at A-82). In his experience grow houses tend to run the air conditioner constantly to counteract the heat of high intensity light bulbs that are used to mimic daylight and make the marijuana plants grow more rapidly. (J.A. at A-83).

While the task force remained in place in public areas outside to secure the scene, Detective Pedraja left to obtain a search warrant. (J.A. at A-83–84). Detective Pedraja prepared and submitted an affidavit to Miami-Dade County Court Judge Sarduy (J.A. at A-44–56), containing the above information—including the fact that Franky had alerted. (J.A. at A-44–56). A search warrant was issued for the house.

The subsequent search of the house, authorized by the warrant, confirmed that it was being used as a grow house. Officers seized live marijuana plants and captured Mr. Jardines as he attempted to flee through a rear door of the house.

A. Trial proceedings

Jardines was subsequently charged with 1) trafficking in excess of 25 pounds of cannabis, a first-degree felony, and 2) grand theft for stealing over five thousand dollars of electricity from Florida Power & Light to grow the marijuana, a third-degree felony. Jardines moved to suppress the evidence seized, asserting that the dog sniff outside his house constituted an unreasonable search under the Fourth Amendment and relying on *State v. Rabb*, 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006), and *Kyllo v. United States*, 533 U.S. 27 (2001). (J.A. at A-57–65). Jardines also asserted that Detective Pedraja's smelling the marijuana was impermissibly tainted by the dog's prior sniff.

At the evidentiary hearing on the motion, both Detective Pedraja and Detective Bartlet testified. (J.A. at A-66–153). Detective Pedraja testified that once he approached the front door to see if anyone was home, he smelled live marijuana plants and then proceeded to secure a search warrant for the premises. And, Detective Bartlet detailed how Franky alerted to the presence of drugs immediately outside the front door of the house as he was trained to do. (J. A. at A-75–105).

The trial court granted the motion to suppress and found that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search," relying upon

State v. Rabb, which had held that a dog sniff of a house was a search. (J.A. at A-204–206).[3] In a footnote, the trial court discounted the detective personally smelling the marijuana because "this information was only confirming what the detection dog had already revealed." (J.A. at A-206 n.1). The trial court determined that the remainder of the information, including the anonymous tip and the air conditioner running constantly, was insufficient to establish probable cause to issue a search warrant for the house. (J.A. at A-205).

B. Appellate proceedings

The State appealed the trial court's suppression order to the Third District Court of Appeal. *State v. Jardines*, 9 So. 3d 1 (Fla. 3d Dist. Ct. App. 2008); (Pet.App. at A-99–135). The Third District reversed the trial court, concluding that "a canine sniff is not a Fourth Amendment search" and that "the officer and the dog were lawfully present at the defendant's front door." (Pet.App. at A-104–105). Following the reasoning of *Illinois v. Caballes*, 543 U.S. 405 (2005), the Third District

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[3] This Court twice considered petitions for certiorari in *Rabb*, first remanding for reconsideration in light of its then-recent decision in *Illinois v. Caballes*, 543 U.S. 405 (2005), *see Florida v. Rabb*, 544 U.S. 1028 (2005), then denying review after the Fourth District again held that a dog sniff of a front door of a house was a search (*State v. Rabb*, 920 So. 2d 1175, 1192 (Fla. 4th Dist. Ct. App. 2006)). *See Florida v. Rabb*, 549 U.S. 1052 (2006).

explained that because a dog sniff detects only contraband and because one does not have a "legitimate" privacy interest in contraband, a dog sniff is not a search under the Fourth Amendment. (Pet.App. at A-105).

The Third District further distinguished Jardines' facts from *Kyllo* noting that "unlike the thermal imaging device at issue in *Kyllo*, a dog is trained to detect only illegal activity or contraband. It does not indiscriminately detect legal activity." (Pet.App. at A-107). The court pointed out that a "dog's nose is not... a 'device,' nor is it improved by technology." (Pet.App. at A-107). "[D]ogs have been used to detect scents for centuries all without modification or 'improvement' to their noses." (Pet.App. at A-107). The court reaffirmed that "the officer had every right to walk to the defendant's front door." *Id.* at 7; (Pet.App. at A-112).

Jardines sought review in the Florida Supreme Court which was granted. That court reversed, concluding that the dog sniff in this case was a "substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment." *Jardines v. State*, 73 So. 3d 34, 36, 49 (Fla. 2011); (Pet.App. at A-1–97). The State Supreme Court discussed this Court's decisions in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Illinois v. Caballes*, 543 U.S. 405 (2005), but found those decisions inapplicable because none involved a "house."

(Pet.App. at A-26–29). It relied instead on *Kyllo* and held that a dog sniff at a house must be supported by probable cause. That court's reasoning was substantially influenced by articulated concerns that the sniff in this case created an embarrassing "public spectacle" and would lead to the use of dogs in large-scale, dragnet-style sweeps. (Pet.App. at A-4, A-41). Ultimately, the court pronounced that a dog sniff of a house must be supported by probable cause. (Pet.App. at A-44–54).

Two justices dissented, concluding that "the majority's decision violates binding United States Supreme Court precedent." (Pet.App. at A-73–97, 73). Justice Polston's opinion noted that it was "undisputed that one dog and two officers were lawfully and briefly present near the front door." (Pet.App. at A-74).

> Franky the dog was lawfully present at Jardines' front door when he alerted to the presence of marijuana. And because, under the binding United States Supreme Court precedent described above, a dog sniff only reveals contraband in which there is no legitimate privacy interest, Franky's sniff cannot be considered a search violating the Fourth Amendment.

(Pet.App. at A-92). The dissent also disputed the majority's conclusion that this Court's various dog

sniff precedents do not apply if the sniff takes place in front of a house: "The United States Supreme Court did not limit its reasoning regarding dogs sniffs to locations or objects unrelated to the home." (Pet.App. at A-93). In the dissent's view, the "very limited and unique type of intrusion involved in a dog sniff is the dispositive distinction under United States Supreme Court precedent, not whether the object sniffed is luggage, an automobile, or a home." (Pet.App. at A-93). "Because the dog sniff is only capable of detecting contraband, it is only capable of detecting that which is not protected by the Fourth Amendment." (Pet.App. at A-96). Consequently, the dog sniff "cannot be considered a search under the Fourth Amendment." (Pet.App. at A-97).

The State of Florida petitioned this Court to review the Florida Supreme Court's decision in *Jardines* and this Court granted review.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court misapplied the precedents of this Court in deciding that a warrant is required before a well-trained police dog may sniff for narcotics outside the front door of a house. This Court has held repeatedly that a dog's sniff is not a Fourth Amendment search. *United States v. Place*, 462 U.S. 696, 707 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005).

Unlike other investigative procedures, a dog sniff is very "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Place*, 462 U.S. at 707; see also *Caballes*, 543 U.S. at 409 (characterizing dog sniffs as *sui generis*). While a drug-detection dog may smell many different odors emanating from a source, it will convey only one thing: whether illegal drugs are present. Because a dog sniff reveals only the fact that contraband is present, and reveals no private facts in the process, it is not considered a Fourth Amendment search. This rule, as reaffirmed in all three Fourth Amendment dog sniff decisions cited above, should control the holding in this case.

Nothing in this Court's well-settled precedents suggests that a dog sniff is an unreasonable search just because it occurs outside a "house." There is no dispute that the sniff in this case occurred in an

area where officers were lawfully present: on the ordinary walkway to the front door that visitors, delivery-persons, mailmen, and Girl Scout cookie-sellers alike would have been expected to use. *See Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) ("officers who are not armed with a warrant [may] knock on a door, [just as] any private citizen might do"). Moreover, a dog's nose—a proven, century-old tool of law enforcement—does "not transform [this action] into an unreasonable search within the meaning of the Fourth Amendment." *United States v. Dunn*, 480 U.S. 294, 305 (1987).

The Florida Supreme Court incorrectly decided this case as an extension of *Kyllo*. *Kyllo*'s prohibition on the use of an advanced imaging device does not apply here because that device revealed intimate information about residents far beyond the mere presence of contraband. In stark contrast, a dog sniff can reveal only one thing: the presence of contraband. For this very reason, this Court in *Caballes* distinguished the *sui generis* nature of dog sniffs from the holding in *Kyllo*.

This case is critically important to the fight against illegal narcotics. Trained drug-detection dogs are an especially effective law enforcement tool because of their exceptional ability to detect the odor of contraband. By simply adhering to the bright-line rule that dog sniffs are not searches, this Court will continue to provide law enforcement a significant and useful aid in the detection of illegal narcotics.

For these reasons, this Court should reverse the Florida Supreme Court and hold that a sniff by a well-trained dog outside the front door of a house is not a Fourth Amendment search requiring probable cause.

ARGUMENT

I. A Dog Sniff Is Not A Fourth Amendment Search Requiring Probable Cause.

This Court has repeatedly said that a sniff by a trained drug-detection dog is not a Fourth Amendment search. *United States v. Place*, 462 U.S. 696, 707 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005). The warrantless sniff in this case comports with others permitted by this Court in *Place*, *Edmond*, and *Caballes* and does not implicate the Fourth Amendment just because it occurred outside a house.

In *Place*, the Court held that a dog sniff of luggage at the airport was not a search because it is "much less intrusive than a typical search" and "discloses only the presence or absence of narcotics." 462 U.S. at 707. Characterizing dog sniffs as "*sui generis*," the Court said they are "limited both in the manner in which the information is obtained and in the content of the

information revealed by the procedure." *Id.* A dog sniff does not expose private matters into the public sphere as would occur if an officer had manually searched the luggage. *Place*, 462 U.S. at 707.[4]

Likewise, in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), the Court concluded that a dog sniff of a car did not transform the seizure into a search because the sniff did not "disclose any information other than the presence or absence of narcotics." *Edmond*, just like this case, did not involve intrusion into private or intimate areas by a dog or his handler; this Court noted especially that "a dog that simply walks around a car is much less intrusive than a typical search."

More recently in *Illinois v. Caballes*, 543 U.S. 405 (2005), the Court held that a dog sniff of a car during a routine traffic stop was not a search. Caballes was stopped for speeding by a trooper. A second trooper arrived with a drug-detection dog. While the first trooper was writing a ticket, the second trooper walked the dog around the car. The dog alerted at the trunk of Caballes' car. The trooper searched the trunk and found marijuana.

---

[4] A dog sniff is quite limited in manner. A dog obtains information merely by breathing near the object, not disturbing anything in the process. *Bond v. United States*, 529 U.S. 334 (2000)(holding an officer squeezing a soft canvas bag was a Fourth Amendment search).

This Court rejected the Illinois Supreme Court's conclusion that reasonable suspicion was a necessary predicate for a lawful dog sniff. *Id.* at 407. The Court again noted that dog sniffs are "*sui generis*." *Caballes*, 543 U.S. at 409. It reaffirmed that a sniff "does not compromise any legitimate interest in privacy [and] is not a search." *Id.* at 408 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

The *Caballes* Court reconciled its prior decision in *Kyllo v. United States*, 533 U.S. 27 (2001), which had held that thermal imaging of a grow house was a search. The Court found its result in *Caballes* "entirely consistent" with *Kyllo*, explaining:

> Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the

> location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

The *Caballes* Court did not distinguish *Kyllo* on the basis that *Kyllo* involved a home. Rather, it distinguished *Kyllo* on the basis that *Caballes* involved a dog. It was the nature of the information detected by the dog's nose, not the area being searched, that mattered. The rationale of *Place* and *Jacobsen* had "absolutely nothing to do with" the location where the dog sniff took place. *Fitzgerald v. State,* 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), *affirmed*, *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004). As Justice Polston's dissent noted in this case, there is no language in *Place*, *Jacobsen*, *Edmond*, or *Caballes* indicating that the reasoning in those cases would change if the dog sniff occurred at a private residence. (Pet.App. at A-93).

The *Caballes* Court relied on the contraband exception to what constitutes a search first established in *Jacobsen*. *Caballes*, 543 U.S. at 408 (explaining that a dog sniff "only reveals the possession of contraband compromises no legitimate privacy interest."). Under this exception, any test, including a dog sniff, which merely reveals contraband, and no other private fact, compromises no legitimate privacy interest

and, therefore, is not a search. The *Jacobsen* contraband exception to a search derives from the principle that one has no legitimate interest in possessing contraband. It is not the end result that this Court is exempting from the Fourth Amendment in its exception, it is the method of finding the contraband that this Court is exempting.

While a drug-detection dog may smell many different odors emanating from the house, the dog conveys only information regarding the presence of drugs. Franky was trained to alert only to marijuana, cocaine, heroin, hashish, methamphetamine, or ecstasy. (J.A. at A-46). And, the only information that his handler received or could have received from Franky was an alert to the presence of contraband. (J.A. at A-46). When a drug-detection dog alerts, he conveys only the public fact that the house contains drugs. Anything else that the dog smells remains private. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 512-15 (2007)(characterizing *United States v. Jacobsen*, 466 U.S. 109 (1984) and *Caballes* as private facts cases). As Professor Kerr explains, "the dog sniff will never reveal a private fact: either the dog won't alert, revealing nothing, or the dog will alert to the presence of narcotics, revealing only information deemed not deserving of privacy protection in *Caballes*." *Id.* at 535. "*Caballes* thus leads to a simple rule: the Fourth Amendment does not regulate dog sniffs." *Id.*

The facts of this case hew closely to *Caballes*. Franky sniffed as the detectives lawfully approached Jardines' house along an ordinary route to his front door. The sniff in *Caballes* occurred collateral to the lawful presence of officers after stopping Caballes' vehicle. Both sniffs were made non-intrusively from areas where officers were lawfully present and both involved alerts only to contraband. Neither sniff violated reasonable expectations of privacy nor intruded into private spaces; and neither sniff revealed any private information.

Because this Court's dog sniff decisions in *Place*, *Edmond*, and *Caballes* directly address the issue here, they should have been followed by the Florida Supreme Court. The sniff in this case did not violate the Fourth Amendment.

II. A Dog Sniff Does Not Become An Unlawful Fourth Amendment Search Just Because It Occurs Outside A House.

The Florida Supreme Court erroneously extended *Kyllo* and failed to follow this Court's well-settled dog sniff cases because it considered the context of a house to be "qualitatively different." (Pet.App. at A-31). But the sniff in this case did not offend the sanctity of Jardines' house as their opinion suggests or transform the fundamentally limited

nature of Franky's sniff into an advanced, technology-laden threat akin to *Kyllo*.

A. The sniff of a drug-detection dog along the ordinary path to the front door did not violate the sanctity of Jardines' grow house.

The Florida Supreme Court concluded that the sniff in this case involved "a substantial government intrusion into the sanctity of the home." But, in reality, at the time of the sniff neither Franky nor the officers entered or intruded into the defendant's house. Franky merely sniffed along the ordinary route to the front door that visitors, delivery-persons, the mailman, Halloween trick-or-treaters, Girl Scout cookie-sellers, and police officers alike would have been expected to use. Once Franky alerted at the outside the front door, he and his handler promptly left the property without ever entering the house.

The Florida Supreme Court's reference to the "sanctity" of the home appears to confuse the modest facts of this case with a substantially different situation where a home is invaded without a warrant. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Michigan v. Summers*, 452 U.S. 692, 701, n.13 (1981). "[S]earches and seizures *inside* a home without a warrant are presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)(citing *Payton v. New York*, 445 U.S. 573, 586 (1980)(emphasis

added). There was no warrantless entry into the house itself in this case. Detective Pedraja obtained a warrant from a neutral and detached magistrate prior to entering the house. All the other officers, including the DEA agents, remained outside the house in public areas until a judge authorized their entry. There was no violation of *Payton*.[5]

Here, it is "undisputed" that the trio of Franky and the detectives "were lawfully and briefly present near the front door" of Jardines' house. (Pet.App. at A-74). No serious argument exists that the Fourth Amendment proscribes officers from approaching the front door of a home. *See United States v. Santana*, 427 U.S. 38, 42 (1976)(plurality)(holding defendant standing in the doorway of her home was in a public place where she had no expectation of privacy for Fourth Amendment purposes); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990)(Breyer, C.J.)("A policeman may lawfully go to a person's home to interview him."). And, as this Court recently

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[5] The *Jacobsen* contraband exception applies only to detection methods that operate outside of the private, protected area. Here, while the protected area is the inside of the house, the sniff occurred from outside the house. If the officers had *entered* the house without a warrant, the contraband exception would not apply. *Byars v. United States*, 273 U.S. 28, 29 (1927)(observing that a "search prosecuted in violation of the Constitution is not made lawful by what it brings to light.").

observed, when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v. King*, 131 S.Ct 1849, 1862 (2011).[6]

In addition, even when Franky tracked odors to their strongest point at the base of Jardines' front door, he was breathing only the air *outside* the house. *United States v. Broadway*, 580 F. Supp. 2d 1179, 1191 (D. Colo. 2008)(stating that a dog does not detect anything inside a home, but merely detects the particulate odors that have escaped from a home). A nose, like an eye, "cannot by the laws of England be guilty of trespass." *Kyllo*, 533 U.S. at 32. Under the plain view doctrine, what an officer sees, hears, or smells when lawfully present at a house is not considered an unlawful search. *Horton v. California*, 496 U.S. 128, 136 (1990)(discussing the plain view exception to the warrant requirement). What a person exposes publicly "even in his own home or office, is not a subject to Fourth Amendment protection." *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (examining "the portion of a house that is in plain public view" is "no search at all."). And just as

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[6] Nor did this Court's recent decision in *United States v. Jones*, 132 S.Ct. 945 (2012), reincorporating trespass into the Fourth Amendment analysis, change this observation. Under the custom exception to the common law of trespass, officers going to a front door are invitees, not trespassers. Additionally, there was no trespass into the house prior to the magistrate issuing a warrant.

evidence in the plain view of officers may be detected without a warrant, evidence in plain smell may be detected without a warrant. *Fitzgerald*, 837 A.2d at 1029 (applying the plain smell doctrine to a dog sniff).

Logically the use of a dog's nose instead of that of an officer "did not transform [the] observations into an unreasonable search within the meaning of the Fourth Amendment." *United States v. Dunn*, 480 U.S. 294, 305 (1987). Officers routinely use tools such as field glasses, flashlights, and dogs as aids to their senses. "The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal." *Fitzgerald v. State*, 837 A.2d 989, 1029 (Md. Ct. Spec. App. 2003), *affirmed*, *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004); *United States v. Reed*, 141 F.3d 644, 649 (6th Cir. 1998)); *See also* (rejecting any constitutionally meaningful distinction between the sniff of trained dog and an officer). "Historically, the law has drawn no doctrinal distinction between the human and the canine sense of smell." *Fitzgerald*, 837 A.2d at 1038.

For these reasons, the involvement of a "house" in this case does not support the Florida Supreme Court's disregard of the *Caballes* line of cases.

B. Kyllo's prohibition on the use of devices does not apply to dog sniffs.

The Florida Supreme Court's opinion in *Jardines* erroneously relied on *Kyllo*, instead of following the dog sniff analysis of *Place*, *Edmond*, and *Caballes*.

First, *Kyllo* is distinguishable from the Court's dog sniff cases because each case involves law enforcement tools of a fundamentally different nature. A thermal imager reveals private facts; a dog does not. Critical to *Kyllo* was that "the device was capable of detecting lawful activity," *Caballes*, 543 U.S. at 409. A dog sniff, in contrast to the *Kyllo* device, "reveals no information other than the location of a substance that no individual has any right to possess." *Caballes*, 543 U.S. at 410. The "*raison d'etre* for treating a dog sniff as a non-search" is the "binary nature of its inquiry." *Fitzgerald,* 837 A.2d at 1030. The *Jacobsen* exception was not at issue in *Kyllo*. *Id.* at 1036.

Second, this Court's primary concern in *Kyllo* was the government's use of high-tech devices eroding traditional protections embodied in the Fourth Amendment. The Court was concerned that technology has the ability "to shrink the realm of guaranteed privacy" and to leave a "homeowner at the mercy of advancing technology." *Kyllo*, 533 U.S. at 34-35, 28. Similar concerns regarding technology were evident in *United States v. Jones,* 132 S.Ct. 945 (2012), with respect to GPS tracking

devices. New technology provides increased convenience but "at the expense of privacy" and the "emergence of many new devices" permits easy and cheap monitoring of a person's movement in a manner that was not previously available likely due to the time and expense that would have been required. *Jones*, 132 S. Ct. at 962-964 (Alito, J., concurring).

But this case involves the very opposite end of the spectrum of law enforcement tools. Unlike the high-tech devices in *Kyllo* and *Jones*, or even the low-tech flashlight in *United States v. Dunn*, 480 U.S. 294, 305 (1987), dogs are not high-tech or "advancing" devices that threaten privacy. Indeed the investigative use of the animal sense of smell, human or canine, cannot even be defined as a technology. *Fitzgerald*, 837 A.2d at 1037. And, as the Florida intermediate appellate court observed in this case, dogs "have been used to detect scents for centuries all without modification or improvement to their noses." (Pet.App. at A-107).[7] There is nothing Orwellian about Franky. Because a dog sniff does not represent rapid technological

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[7] Dogs were used for their extraordinary sense of smell at the time the Fourth Amendment was adopted in 1791. *Jones*, 132 S. Ct. at 949, 953 (stating that the Fourth Amendment must be interpreted to "provide at a minimum the degree of protection it afforded when it was adopted"); *Kyllo*, 533 U.S. at 40. A dog "does not detect anything that 'would have been unknowable' without physical intrusion when the Fourth Amendment was adopted in 1791." *United States v. Broadway*, 580 F. Supp. 2d 1179, 1190 (D. Colo. 2008).

change and does not invade traditionally protected areas, the rationale of *Kyllo* and concerns of *Jones* are simply inapplicable.

Third, other courts have followed this Court's lead in rejecting the application of *Kyllo* to dog sniffs. Indeed, every federal court that has addressed the issue since *Caballes* has held that a dog sniff of a residence is not a search. *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011)(holding that a dog sniff of the front door of an apartment is not a search because dog sniffs are *sui generis* and a sniff discloses only contraband, following the logic of *Caballes* and rejecting any analogy to *Kyllo*); *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005)(holding that a dog sniff of a locked bedroom door in a house was not a search because it detected only the presence of contraband, rejecting any analogy to *Kyllo* and instead following the logic of *Caballes*); *United States v. Byle*, 2011 WL 1983355 (M.D. Fla. May 20, 2011)(holding a dog sniff of a window of a house is not a search and refusing to follow *Jardines* because "the Supreme Court meant what it said - a dog sniff is not a search"); *United States v. Anthony*, 2012 WL 959448 (D. N.J. March 20, 2012)(holding a dog sniff of the front door of an apartment was not a search and rejecting the reasoning of *Jardines*); *United States v. Broadway*, 580 F. Supp. 2d 1179, 1188-90 (D. Colo. 2008) (holding that "a dog sniff—even when employed outside a residence—does not constitute a 'search.'"). State courts, likewise, have

rejected the analogy between the thermal imager in *Kyllo* and a dog. *See, e.g., Fitzgerald v. State*, 837 A.2d 989 (Md. Ct. Spec. App. 2003)(rejecting the assertion that a drug sniffing dog is the functional equivalent of the sense-enhancing device used in *Kyllo*).

Kyllo does not apply by its own terms. The *Kyllo* Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search.'" *Kyllo*, 533 U.S. at 40. *Kyllo* did not and does not apply to dogs.

C. This case involves a century-old law enforcement technique that will not lead to dragnet-style sweeps.

Dogs have been used by law enforcement for over a century, *see e.g. Hodge v. State*, 13 So. 385 (Ala. 1893), and used for drug detection for over forty years. *People v. Furman*, 106 Cal. Rptr. 366, 368 (Cal. Ct. App. 1973). The majority opinion of the Florida Supreme Court expressed unfounded concerns about embarrassing, suspicionless dog sweeps of entire residential neighborhoods. (Pet.App. at A-41, n.7). The Florida Supreme Court believed that permitting a dog sniff of one house invited the "overbearing and harassing" conduct of suspicionless sweeps of entire neighborhoods based on "whim and fancy." (Pet.App. at A-4).

This Court, by contrast, has refused to base its dog sniff jurisprudence on extravagant generalizations. *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 n.5 (1986)(stating that "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations."). Justice Ginsburg cited the prospect of such sweeps as a basis for her *Caballes* dissent. *Caballes*, 543 U.S. at 422 (Ginsburg, J., dissenting). She stated that the majority opinion had cleared "the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots." *Id.* at 422. But the majority did not share her concern. Additionally, any concern about widespread suspiciousless sweeps is an "odd" basis to distinguish *Place* or *Caballes* because such a concern would be "equally present" in those cases. *United States v. Anthony*, 2012 WL 959448 (D. N.J. March 20, 2012).

Tellingly, in the seven years since *Caballes*, dragnet-style sweeps of entire residential neighborhoods have simply not materialized. There are no reported cases of such sweeps.

The Florida Supreme Court ignored the practical limits on the ability of law enforcement to employ trained drug-detection dogs in time-consuming, random sweeps of entire neighborhoods. Dog-handler teams are not cheap and surreptitious devices that evade the ordinary checks of "limited police resources and community hostility" on

abusive law enforcement practices. *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring)(quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)). These ordinary constraints apply. Trained drug-detection dogs are a scarce resource that are in high demand. (J.A. at 99; Pet.App. at A-95). And, unlike the GPS device in *Jones*, neighborhood-wide sweeps with numerous dogs and their handlers would not be surreptitious. This case should not turn on extravagant hypotheticals about suspicionless dog sweeps, but on the limited nature of Franky's sniff that merely alerted his handler to the presence of contraband.

Finally, dogs are an irreplaceable tool for detecting those who grow marijuana in their bathrooms; construct meth labs in their kitchens; or hide bodies in their basements. Dogs can detect all these criminal activities merely by breathing the air outside a house just as Franky did here. The importance of these dogs and the consequences of this case for law enforcement simply cannot be overstated.

For all these reasons, this Court should adhere to its well-settled precedents by holding that a dog sniff outside the front door of a house is not a Fourth Amendment search requiring probable cause.

CONCLUSION

The Florida Supreme Court's decision should be reversed.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300

COUNSEL FOR PETITIONER

RESPONDENT'S BRIEF

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STATE OF FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR RESPONDENT

CARLOS J. MARTINEZ
Public Defender
ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA

MARIA E. LAUREDO
Chief Assistant Public Defender

HOWARD K. BLUMBERG*
Assistant Public Defender
hblumberg@pdmiami.com

ROBERT KALTER
Assistant Public Defender

1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

Counsel for Respondent

**Counsel of Record*

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QUESTION PRESENTED

Whether a dog sniff at the front door of a private home by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

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STATEMENT OF THE CASE

Based on an anonymous tip, and without a warrant, probable cause or consent, a police officer with a narcotics detection dog walked up to the front door of the home of the respondent Joelis Jardines. The dog sniffed the area outside the front door of the home, sniffed around the base of the front door of the home, and then assumed a sitting position. The officer considered these actions by the dog to be a positive alert to the presence of contraband inside the home. The Florida Supreme Court held that the use of the police drug detection dog in this manner to sniff for illegal drugs at the front door of Mr. Jardines' private home constituted a Fourth Amendment search.

1. On November 3, 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified "crime stoppers" tip that marijuana was being grown at the home of Joelis Jardines. J.A. 49, 76-77. One month later, on December 5, 2006, at approximately 7:00 a.m., members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, set up a surveillance of Jardines' home. *Id.* at 49, 77, 154-55. Detective Pedraja watched the home for approximately fifteen minutes. During that time, the detective observed no vehicles in the driveway, and he observed that the blinds on the windows were closed. *Id.* at 49-50, 77.

After the fifteen-minute observation period, Detective Douglas Bartelt arrived on the scene with his

drug detection dog, Franky. *Id.* at 77, 93. Detective Bartelt, accompanied by the drug detection dog, stepped onto the property and moved up the driveway toward the front door of the home. *Id.* at 77-78, 93-94. Detective Pedraja stayed behind as Detective Bartelt and the drug detection dog approached the front of the home. *Id.* at 78. Sergeant Ramirez and Detective Donnelly of the Miami-Dade Police Department established perimeter positions around the home and federal DEA agents positioned themselves as a support unit. *Id.* at 155.

The entranceway to the front door of the home was enclosed with an archway. *Id.* at 90, 94-95. Through the archway was the alcove of the porch outside the front door of the home. *Id.* at 94. The entry of the archway was approximately six to eight feet from the front door of the home. *Id.* at 90. A photograph of the front of the house was admitted into evidence as a State exhibit at the hearing on the motion to suppress. *Id.* at 90. *See* Resp. App. 1.

The drug detection dog pulled Detective Bartelt directly up to the front porch as the dog was trained to do. The dog was "very strongly driven," and he was one of the drug detection dogs that would pull Detective Bartelt "very dramatically." *Id.* at 94. Detective Bartelt made sure to maintain his hold on the dog's leash because the dog was "a little bit wild." *Id.* at 97. Anyone standing next to the dog "probably would get knocked over by Frankie when Frankie is spinning around trying to find source." *Id.* at 78, 93-94, 104-05. Detective Bartelt stood right before the archway

leading to the alcove. *Id.* at 80, 90, 95. The dog's leash was approximately six feet long and the detective got as far back as he could to let the dog have the full six feet of the leash to go up to the front door. *Id.* at 80, 96-97. The only thing Detective Bartelt smelled as he stood at the base of the front porch was mothballs, and he saw two or three mothballs where he was standing. *Id.* at 100.

As Detective Bartelt maintained his hold on the dog's leash, the dog crossed over the threshold of the archway and began tracking an airborne odor by repeatedly bracketing and tracking back and forth to determine the strongest source of the odor. *Id.* at 94-96. Detective Bartelt considered an alert to the presence of contraband to be "the minute I observed out of normal behavior" for the dog. *Id.* at 95. In this case, Detective Bartelt considered the dog's abnormal behavior to be the dog holding his head high and bracketing and tracking back and forth. *Id.* at 95-97. After the dog repeatedly bracketed back and forth outside the front door of the house, the dog sniffed around at the base of the front door and then assumed a sitting position. Detective Bartelt considered this sitting position to be "the final culmination of his abnormal behavior," which indicated to the detective the source of the odor. *Id.* at 98.

2. Detective Bartelt told Detective Pedraja there was a positive alert for the odor of narcotics and then returned to his police vehicle with the dog. *Id.* He then prepared the information concerning the dog's training to be included in the affidavit for a search

warrant. *Id.* at 99. Since Detective Bartelt and the dog became a team they had received weekly maintenance training in accordance with established police procedures. The dog was trained to detect "the odor of narcotics emanating from the following controlled substances to wit: marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy." Upon detecting the odor of any of these controlled substances, the dog would exhibit "a noticeable change of behavior" and was trained to sit at the source of the odor. The dog had worked approximately 656 narcotics detection tasks in the field and had positively alerted to the odor of narcotics approximately 399 times. Detective Bartelt listed information concerning the amounts of narcotics detected and seized as the result of the dog's positive alerts, but he did not list any information concerning how many of those positive alerts had not resulted in the detection and seizure of any narcotics. *Id.* at 54.

3. After Detective Pedraja received the signal from Detective Bartelt that the dog had alerted to contraband, Detective Pedraja approached the front door of the house for the first time. At the front door of the house he smelled "the scent of live marijuana." *Id.* at 81. Detective Pedraja knocked on the front door and received no response. He then walked back out of the alcove. From the time he went to the front door to the time he walked out of the alcove and stood at the area outside the alcove, Detective Pedraja heard an air conditioner unit continuously running for 15-20 minutes. After making this observation the detective

got in his police vehicle and drove to a location close by to start preparing a search warrant. *Id.* at 81-83. The affidavit in support of this warrant ultimately contained the observations made at the scene by Detective Pedraja and Detective Bartelt. *Id.* at 49-50. Federal DEA agents remained behind to maintain surveillance of Jardines' home. *Id.* at 155.

Detective Pedraja obtained a search warrant later that day and about an hour after the warrant was obtained, members of the Miami-Dade Police Department, Narcotics Bureau, and DEA agents executed the warrant by gaining entry to Jardines' home through the front door. *Id.* at 59, 84. As agents entered the front door, Jardines exited through a sliding glass door at the rear of the house. Jardines was apprehended by Special Agent Wilson of the DEA and turned over to the Miami-Dade Police Department. A search was conducted, which revealed that marijuana was being grown inside the home. Jardines was arrested and charged with trafficking in marijuana and theft of electricity. *Id.* at 59.

4. Jardines subsequently filed a motion to suppress the evidence seized from his home. The trial court granted the motion to suppress, ruling that pursuant to *State v. Rabb*, 920 So.2d 1175 (Fla. 4th Dist. Ct. App. 2006), *review denied*, 933 So.2d 522 (Fla.), *cert. denied*, 549 U.S. 1052 (2006), law enforcement's use of the drug detection dog at the front door of Jardines' house constituted an unreasonable and illegal search. *Id.* at 204-06. The trial court rejected the State of Florida's argument that Detective Pedraja's

later detection of the odor of marijuana at the front door constituted a valid basis for the search warrant under the independent source doctrine. The trial court made a factual finding that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. *Id.* at 205-06, n.1.[1] The trial court ruled that no independent and lawfully obtained evidence established the probable cause necessary to support the issuance of the search warrant for Jardines' home. *Id.* at 205-06.

5. The State of Florida appealed the suppression order to the Florida Third District Court of Appeal, and that court reversed the order granting the motion to suppress. Pet.App. 99-135. The appeals court declined to follow the decision in *Rabb*, and ruled that "a canine sniff is not a Fourth Amendment search." Pet.App. 104. The court also ruled that "the officer and the dog were lawfully present at the defendant's front door." Pet.App. 104-05. Judge Cope, concurring in part and dissenting in part, disagreed with the majority's conclusion that the constitutional protection of the Fourth Amendment did not extend to the front porch of Jardines' home. Pet.App. 124-26. Judge Cope concluded that while "it is perfectly acceptable for a detective to come to the front door to speak with the owner," there are limits on the right of a police

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[1] The State's argument based on the independent source doctrine was not raised in the certiorari petition filed by the State of Florida in this Court and therefore the issue is not before this Court.

officer to enter the front porch of a home to conduct a search for evidence of a crime. Pet.App. 125-26.

On petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved the result in *Rabb*. Pet.App. 1-97. The Court held that the use of the drug detection dog to determine what was inside Jardines' home was a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. *Id.* at 4. The Court further held that probable cause must be established prior to conducting such a search at a private residence. *Id.* at 4-5.[2]

The Florida Supreme Court examined in great detail the decisions of this Court in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005); *United States v. Jacobsen*, 466 U.S. 109 (1984); and *Kyllo v. United States*, 533 U.S. 27 (2001). Pet.App. 14-26. The Florida Supreme Court noted that in *Place*, *Edmond*, *Caballes* and *Jacobsen*, this Court "was careful to tie its ruling to the particular facts of the case." Pet.App. 27. The Florida Supreme Court further noted that the police investigations in the four cases "were conducted in a

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[2] The State of Florida did not seek certiorari review of this holding that if the dog sniff is a Fourth Amendment search, probable cause must be established to support such a search. Accordingly, that issue is not before this Court.

minimally intrusive manner upon objects – luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen* – that warrant no special protection under the Fourth Amendment." Pet.App. 28.

The Florida Supreme Court then looked to this Court's decision in *Kyllo* and its instruction that nowhere is the right to be free from unreasonable governmental intrusion more resolute than in the private home. Pet.App. 29-30. The Florida Supreme Court also looked to the English common law background of the Fourth Amendment which demonstrates that "[t]he sanctity of the citizen's home is a basic tenet of Anglo-American jurisprudence." Pet.App. 30-31.

After fully examining this Court's precedents, the Florida Supreme Court concluded:

> Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment – specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet.App. 42. The Court also noted the significant difference between a police officer approaching the front door of a home to speak to the owner of the

home, and a police officer approaching the front door of a home with a narcotics detection dog to conduct a search for evidence of a crime:

> Although police generally may initiate a "knock and talk" encounter at the front door of a private residence without any prior showing of wrongdoing, *see State v. Morsman*, 394 So.2d 408, 409 (Fla.1981) ("Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time."), a dog "sniff test" is a qualitatively different matter.

Pet.App. 31.

6. This Court granted certiorari. 132 S. Ct. 995 (2012).

SUMMARY OF ARGUMENT

I. A police officer's use of a trained narcotics detection dog at the front door of a home to reveal details inside that home which the officer is unable to discover using the officer's ordinary powers of perception without a physical intrusion into the home is a Fourth Amendment search requiring a warrant based on probable cause.

A. The history of the Fourth Amendment demonstrates that it guarantees the right to retreat into one's own home and be free from any action by government officials which intrudes upon the sanctity of

that home and the privacies of life inside the home absent a warrant issued by a magistrate based on probable cause. This Court's Fourth Amendment jurisprudence confirms that government activity that reveals any detail which an individual seeks to keep private within the home constitutes a search under the Fourth Amendment. A police officer using a narcotics detection dog to find out what is inside a home unquestionably reveals details which an individual seeks to keep private within the home. That being the case, a police officer's use of a trained narcotics detection dog to obtain information regarding the interior of a home constitutes a search under the Fourth Amendment, even if it is accepted that a trained narcotics dog discloses only the presence or absence of contraband.

B. This Court's prior decisions concluding that a dog sniff of luggage at an airport and a dog sniff of an automobile on a public street are not Fourth Amendment searches do not establish that a dog sniff at the front door of a home is not a Fourth Amendment search. This Court's Fourth Amendment decisions demonstrate that the context of the governmental actions taken to reveal evidence of criminal activity must be taken into consideration in determining if those government actions intrude upon a legitimate expectation of privacy and therefore constitute a Fourth Amendment search. This Court has found that governmental action does not constitute a Fourth Amendment search where police officers simply allow a narcotics detection dog to sniff objects in public

places, objects which have a reduced expectation of privacy, and objects already seized by government officials. In contrast, governmental action has been found by this Court to be a Fourth Amendment search where that action was taken to reveal details inside a home where all details are intimate details held safe from prying government eyes. As the use of a narcotics detection dog at the front door of a home reveals details inside a home, such police action constitutes a Fourth Amendment search under this Court's prior decisions.

This Court should reject the State of Florida's proposed rule that the use of any searching tool which reveals only the presence of contraband is not a Fourth Amendment search no matter the level of intrusiveness of that searching tool. Under this interpretation of the Fourth Amendment, police officers would be free to randomly take a narcotics detection dog up to the front door of selected houses in a suburban neighborhood, or take a narcotics detection dog up to the front door of every apartment in an inner city apartment complex selected by the police, or walk a narcotics dog up and down the halls of a school to sniff the students passing by. The State's proposed rule would also allow unlimited use of any current technology which detects only contraband or illegal activity to reveal details inside a home, and would create a significant incentive to law enforcement officials to develop new technology to reveal details inside the home.

C. The government's use of a drug detection dog to reveal details of the home constitutes a Fourth Amendment search even though the dog does not physically enter the home. This Court's decisions establish that the Government's use of a searching tool to explore details of the home that would have been unknowable without physical intrusion constitutes a search. The actions of the dog constitute a search even though the dog only detects odors emanating from the house. This Court's decisions establish that a Fourth Amendment search of a home occurs even though police officers do nothing more than draw an inference as to what is inside a home from the perception of what is emanating outside the house.

II. Aside from a police officer's use of the narcotics detection dog to reveal details inside the home, the actions of a police officer in approaching the front door of a home with the narcotics detection dog also constitute a Fourth Amendment search.

A. The front door of a home and the area immediately adjacent to the front door of a home clearly fall within the curtilage of the home as this Court's decisions establish that the area immediately surrounding a private home is within the curtilage of the home.

B. When a police officer with a narcotics detection dog approaches the front door of a home without the consent of the owner, the officer physically trespasses upon an area enumerated in the Fourth Amendment for the purpose of obtaining information.

Such a physical intrusion is a search within the meaning of the Fourth Amendment. While a police officer may have an implied invitation by custom to approach the front door of a house for the purpose of speaking to the occupant of the house, no such implied invitation by custom exists for an officer to approach the front door of a house with a narcotics detection dog for the purpose of searching for evidence. Accordingly, the officer's approach to the front door of the house with the dog is a trespass. As the officer is trespassing onto the curtilage of the home which is a constitutionally protected area, and as the trespass onto the curtilage with the dog is for the purpose of obtaining evidence, that trespass constitutes a Fourth Amendment search.

C. A police officer's approach to the front door of a home with a narcotics detection dog also constitutes a Fourth Amendment search because it violates the homeowner's reasonable expectation of privacy in the curtilage of the home. A salesperson, a person delivering a package, a young girl selling Girl Scout cookies, or a police officer intending to speak to an occupant of the house, do not invade the homeowner's reasonable expectation of privacy when they enter the curtilage of the home to knock on the front door. A homeowner must expect that such persons will approach the front door in an attempt to speak to the occupants of the house. However, a homeowner does not expect that such persons will approach the front door of the house for the purpose of trying to determine what is inside that house. A police officer who approaches the front

door of a house with a narcotics detection dog unquestionably does so for the purpose of trying to determine what is inside the home. That being the case, a police officer who approaches the front door of a house with a narcotics detection dog invades the homeowner's reasonable expectation of privacy, and therefore that police action constitutes a Fourth Amendment search.

ARGUMENT

The issue in this case goes to the very heart of the rights secured to an individual by the Fourth Amendment. A dog sniff at the front door of a home by a narcotics detection dog is a Fourth Amendment search requiring a warrant based upon probable cause for two reasons. First, a homeowner's reasonable expectation of privacy is violated where a police officer uses a narcotics detection dog to reveal any details within the interior of a home that could not be discovered by the officer's ordinary powers of perception without a physical intrusion into the home. Second, and aside from the officer's use of a narcotics detection dog to reveal details inside the home, the actions of a police officer in taking a narcotics dog to the front door of a home also constitute a Fourth Amendment search. This is so because the officer's entry into the curtilage of the home with a narcotics detection dog is a common law trespass upon a constitutionally protected area in order to conduct a search

for evidence, and also because that entry violates the homeowner's reasonable expectation of privacy.

I. A DOG SNIFF AT THE FRONT DOOR OF A HOME BY A NARCOTICS DETECTION DOG IS A FOURTH AMENDMENT SEARCH REQUIRING A WARRANT BASED UPON PROBABLE CAUSE BECAUSE THE DOG SNIFF VIOLATES THE HOMEOWNER'S REASONABLE EXPECTATION OF PRIVACY.

A homeowner's reasonable expectation of privacy is violated where a police officer uses a narcotics detection dog to reveal any details within the interior of a home that could not be discovered by the officer's ordinary powers of perception without a physical intrusion into the home. In the home, all details are intimate details because the Fourth Amendment guarantees the right to retreat into one's home and be free from any action by government officials to reveal those details. Due to this uniquely heightened Fourth Amendment protection historically accorded to the home, this Court's decisions regarding the use of narcotics detection dogs to sniff the exteriors of luggage or stopped cars located in public places are inapposite.

A. The History Of The Fourth Amendment And This Court's Fourth Amendment Decisions Establish That Police Action Which Reveals Any Detail An Individual Seeks To Keep Private Within The Home Is A Fourth Amendment Search.

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The Fourth Amendment draws "a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 589 (1980). The line drawn at the entrance to the house "must be not only firm but also bright – which requires clear specification of those methods of surveillance that require a warrant." *Kyllo*, 533 U.S. at 40. "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Id.* at 31.

The Fourth Amendment embodies principles of respect for the privacy of the home that have a long history:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.). In his Commentaries on the Laws of England, William Blackstone noted that
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> > "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 Commentaries 223 (1765-1769).

Wilson v. Layne, 526 U.S. 603, 609-10 (1999). Stated in more contemporary terms:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Silverman, 365 U.S. at 511 n.4 (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting).

This Court often looks to *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), to determine the proper interpretation of the Fourth Amendment. *See United States v. Jones*, 132 S. Ct. 945, 949 (2012) (noting that the Court has described *Entick* as a "'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law' with regard to search and seizure." (citing *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886))). This Court in *Boyd* recognized that the principles expressed in *Entick* concerning the sanctity of the home go to the very heart of the protections afforded to an individual by the Constitution:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right

> has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment.

Boyd, 116 U.S. at 630. Relying on these principles, the *Boyd* Court held that compelling a defendant to produce documents from his home is an unreasonable search and seizure under the Fourth Amendment. *Id.* at 632.

Thus, the history of the Fourth Amendment demonstrates that it guarantees the right to retreat into one's own home and be free from any governmental action which intrudes upon the sanctity of that home and the privacies of life within the home absent a warrant issued by a magistrate based upon probable cause. The Fourth Amendment prohibits any warrantless invasion of the individual's right of personal security, personal liberty, and private property. A police officer using a narcotics detection dog to find out what is inside a home unquestionably constitutes an invasion of the homeowner's right of personal security, personal liberty, and private property. That being the case, the use of a trained narcotics detection dog to obtain information regarding the interior of a home constitutes a search under the Fourth Amendment, even if it is accepted that a trained narcotics dog discloses only the presence or absence of contraband.

This Court's Fourth Amendment jurisprudence confirms that government activity which reveals any detail that an individual seeks to keep private within

the home constitutes a search under the Fourth Amendment.[3] Where no physical trespass on private property has taken place,[4] "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo*, 533 U.S. at 32-33 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). This Court observed in *Kyllo* that while

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[3] An exception to this warrant requirement applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978); *see also Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011). For example, under the "emergency aid" exception, officers may conduct a warrantless search of a house "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 403, (2006). Police officers may also conduct a warrantless search of a home when they are in hot pursuit of a fleeing suspect. *See United States v. Santana*, 427 U.S. 38, 42-43 (1976). Thus, nothing would prevent a police officer from using a bloodhound at the front door of a house if the officer has a reasonable belief that someone inside the house needs emergency medical assistance, or a reasonable belief that a missing child might be inside the house, or a reasonable belief that a fleeing suspect being chased in hot pursuit might be inside the house. The use of the bloodhound would still constitute a Fourth Amendment search because it revealed details inside the home, but that warrantless search would be allowed under the exigent circumstances exception to the warrant requirement. No exigent circumstances were present in this case.

[4] Where, as here, an officer does physically trespass onto the constitutionally protected curtilage of a home with a narcotics detection dog, this action also constitutes a Fourth Amendment search requiring a warrant based on probable cause. *See* Argument IIB, *infra*.

the *Katz* test might be difficult to apply under certain circumstances, no such difficulty applies when the object of the police search is the interior of a home. "[I]n the case of the search of the interior of homes – the prototypical and hence most commonly litigated area of protected privacy – there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." *Id.* at 34 (emphasis in original).

This Court explained in *Kyllo* that the nature of the information obtained regarding the interior of the home is not relevant to the determination of whether a Fourth Amendment search has occurred. This Court noted, "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Id.* This Court pointed out that "there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor." *Id.* Finally, this Court declared, "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id.* (emphasis in original).

This Court in *Kyllo* relied on *United States v. Karo*, 468 U.S. 705 (1984) to demonstrate the principle that all details in the home are held safe from prying government eyes. *See Kyllo*, 533 U.S. at 37-38. In *Karo*, the only thing detected inside a home was the presence of a can of ether used to extract cocaine

from clothing imported into the United States. This Court held that the detection of this can of ether in the home by the activation of a beeper inside the can was a Fourth Amendment search. Notwithstanding the fact that the only information disclosed by the beeper in *Karo* was the presence inside the house of narcotics paraphernalia (the can of ether used to extract cocaine from clothing), this Court held that the use of the beeper to disclose that information was a search because the beeper revealed details of the home that would previously have been unknowable without physical intrusion into the home.

The *Karo* Court first noted, "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *Karo*, 468 U.S. at 714. This Court acknowledged that the monitoring of a beeper is "less intrusive than a full search." *Id.* at 715. Nevertheless the *Karo* Court held this monitoring constitutes a Fourth Amendment search because "it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." *Id.* This Court rejected the Government's contention that the monitoring of the beeper was not a Fourth Amendment search because it only disclosed whether a particular object or person was inside the house at a particular time. "Indiscriminate monitoring of property that has been

withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Id.* at 716.

The beeper in *Karo* disclosed nothing more than the presence of narcotics paraphernalia used to extract cocaine. Yet this Court held that the use of the beeper to disclose the presence of that object inside a home is a Fourth Amendment search. Accordingly, even if a narcotics detection dog discloses nothing more than the presence of contraband inside a home, such use of the dog is a Fourth Amendment search because it discloses a critical fact about the interior of the home that the Government could not have otherwise obtained without a warrant.

The second example given by the *Kyllo* Court to demonstrate the principle that all details in the home are intimate details is *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, the only information detected inside the house was the serial number on the bottom of stereo equipment indicating that it was stolen. Yet this Court held that the police act of moving the stereo equipment to discover this serial number was a Fourth Amendment search. Notwithstanding the fact that the only information uncovered by the police was that the equipment was stolen property, this Court held that the police action was a search because it revealed details inside the home:

> But taking action, unrelated to the objectives of the authorized intrusion, which exposed to

> view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. This is why, contrary to Justice POWELL's suggestion, post, at 1156, the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent – serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. *A search is a search, even if it happens to disclose nothing but the bottom of a turntable.*

480 U.S. at 325 (emphasis added).

Just as the actions of the government officials in *Karo* did nothing more than reveal the presence inside a home of contraband narcotics paraphernalia, the actions of the police in *Hicks* did nothing more than reveal the presence inside a home of an item of contraband, a stolen turntable. Nevertheless, this Court held in both cases that the officers' acts in disclosing the presence of these objects inside the home constituted a Fourth Amendment search because all details in the home are held safe from prying government eyes. That being the case, a dog sniff by a trained drug detection dog which does nothing more than reveal the presence of contraband inside the home constitutes a search under the Fourth Amendment

because all details in the home are intimate details safe from prying government eyes. A search of a home without a warrant supported by probable cause is presumptively unreasonable. *Kyllo*; *Payton*. Accordingly, a police officer's use of a trained narcotics detection dog at the front door of a home to obtain information about what is inside that home is a Fourth Amendment search requiring a warrant based upon probable cause.

B. The Decisions Of This Court In *Place*, *Edmond*, And *Caballes* Do Not Establish That A Dog Sniff At The Front Door Of A Home Is Not A Fourth Amendment Search.

The State of Florida contends that the decisions of this Court in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Illinois v. Caballes*, 543 U.S. 405 (2005), establish that the use of a narcotics detection dog to reveal the details of the interior of a home is not a Fourth Amendment search. The State argues that because a narcotics detection dog only reveals the presence of contraband, the use of a detection dog, or any other tool which law enforcement officials might conceivably develop to reveal only the presence of contraband, cannot be considered a search under the Fourth Amendment no matter the circumstances under which the contraband is revealed. This argument should be rejected for several reasons.

1. *Place*, *Edmond*, and *Caballes* Are Inapposite Because These Decisions Involve Searches of Seized Luggage and Stopped Cars in Public Places, Not Government Intrusion Into the Sanctity of the Home Revealing Details Inside the Home.

In *Place*, this Court addressed the issue of whether police could temporarily seize a piece of luggage at an airport and then expose the luggage to a narcotics detection dog. After holding that the detectives' ninety-minute detention of the luggage was too lengthy to be supported under *Terry v. Ohio*, 392 U.S. 1 (1968), this Court found that the exposure of the luggage to the drug detection dog did not constitute a Fourth Amendment search. In reaching this conclusion, this Court noted that the exposure of the luggage at the airport to the drug detection dog was "much less intrusive than a typical search." *Place*, 462 U.S. at 707. This Court also noted that the content of the information revealed by the drug detection dog was limited, as "the sniff discloses only the presence or absence of narcotics, a contraband item." *Id.* In these respects, this Court found the canine sniff of the luggage to be "sui generis." *Id.* However, this Court limited its conclusion to the specific factual context of the case, stating "that *the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine* – did not constitute a 'search' within

the meaning of the Fourth Amendment." *Id.* (emphasis added).

Next, in *Edmond*, this Court determined that walking a narcotics detection dog around the exterior of a vehicle stopped at a highway checkpoint did not transform that seizure into a Fourth Amendment search. Again, as in *Place*, this Court focused on the limited nature of the intrusion under the specific facts of the case before the Court, and concluded, "Like the dog sniff in *Place*, a sniff by a dog *that simply walks around a car* is 'much less intrusive than a typical search.'" *Edmond*, 531 U.S. at 40 (quoting *Place*, 462 U.S. at 707).

Finally, in *Caballes*, this Court ruled that a sniff by a drug detection dog of the exterior of a vehicle during the course of a lawful traffic stop did not constitute a Fourth Amendment search. In *Caballes*, this Court focused on the fact that generally governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest. As an example of this principle, this Court cited its previous decision in *United States v. Jacobsen*, 466 U.S. 109 (1984), holding that a government agent's field test of an unidentified powder already exposed to view by a private freight carrier was not a Fourth Amendment search because the test could only reveal whether the powder was cocaine. Another example of this principle given in *Caballes* was the ruling in *Place* that exposing luggage to a well-trained narcotics detection dog which only revealed the presence of contraband was not a Fourth Amendment search.

Based on these examples, this Court found that the specific governmental conduct under the circumstances of that case did not constitute a Fourth Amendment search:

> Accordingly, the use of a well-trained narcotics-detection dog – one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637 – *during a lawful traffic stop, generally* does not implicate legitimate privacy interests. *In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation.* Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Caballes, 543 U.S. at 409 (emphasis added).

The *Caballes* Court explained that its holding was consistent with the conclusion in *Kyllo* that the use of a thermal imaging device to determine the level of heat emanating from a home was a search. This Court pointed out that the two cases involved two different factual contexts. *Kyllo* involved the use of a searching tool (the thermal imaging device) that revealed details inside a home which might relate to lawful activity or unlawful activity. *Caballes* involved the use of a searching tool (a narcotics detection dog) to reveal details that related only to unlawful activity inside the trunk of a car stopped on a public street.

This case presents a third factual context – the use of a searching tool (a narcotics detection dog) which revealed details inside a home which related only to unlawful activity. This Court's decisions demonstrate that whether a police action reveals details inside a home is the critical factor which establishes that the governmental action is a Fourth Amendment search.

Where the governmental action is a police officer's field test of an unidentified powder in a package already discovered by a private freight carrier, and the test could only reveal whether the powder was cocaine, there is no intrusion of a legitimate expectation of privacy and thus no Fourth Amendment search. *Jacobsen*. Where a police officer exposes the exterior of luggage in an airport to a well-trained drug detection dog which only reveals the presence of contraband, there is no intrusion of a legitimate expectation of privacy and thus no Fourth Amendment search. *Place*. Where the police expose the exterior of an automobile already stopped by police on a public roadway to a well-trained drug detection dog which only reveals the presence of contraband, there is no intrusion of a legitimate expectation of privacy and thus no Fourth Amendment search. *Edmond*; *Caballes*.

On the other hand, where the police action is the use of a tool to gather information about details inside a home, whether those details are lawful or unlawful, the action intrudes upon a legitimate expectation of privacy and therefore is a Fourth Amendment

search. Police use of a beeper to disclose nothing more than the presence inside a home of narcotics paraphernalia used to extract cocaine is a Fourth Amendment search because it reveals a detail inside the home. *Karo*. Similarly, a police officer moving a piece of stereo equipment inside a home to reveal a serial number on the bottom of the equipment indicating that it was stolen is a search within the meaning of the Fourth Amendment because it discloses a detail inside a home. *Hicks*. Finally, police use of a thermal imaging device to view heat emanating on the outside of a home is a Fourth Amendment search because it reveals details inside the home. *Kyllo*.

"In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37 (emphasis in original). This is so because the history of the Fourth Amendment and this Court's Fourth Amendment jurisprudence establish that the Constitution guarantees the right to retreat into one's home and be free from any action by government officials which intrudes upon the sanctity of that home and the privacies of life inside the home absent a warrant based on probable cause. Indisputably, *Place*, *Jacobsen*, *Edmond*, and *Caballes* do not involve the historical foundations of the Fourth Amendment that are such a critical factor in considering whether government actions to determine what is inside a home constitute a Fourth Amendment search. Accordingly, those decisions do not establish that the use of a trained drug detection dog at the front door of a home

to obtain information about what is inside the home does not constitute a Fourth Amendment search.[5] Because the use of a narcotics detection dog to reveal what is inside a home does involve the historical special status afforded to a home, it constitutes a

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[5] The lower court decisions which hold that a dog sniff at the front door of a home does not constitute a Fourth Amendment search fail to properly consider the historical foundations of the Fourth Amendment and the sanctity of the home derived from those historical foundations. *See, e.g., United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011); *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005); *Fitzgerald v. State*, 837 A.2d 989 (Md. Ct. Spec. App. 2003), *affirmed*, *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004). Those decisions are based on an overly broad interpretation of this Court's decisions in *Place*, *Edmond*, *Jacobsen* and *Caballes*, disregard the importance of the context of the police actions in those cases, and rely instead on a mathematical-type equation to reach the conclusion that a dog sniff at the front door of a home is not a search. *See, e.g., Fitzgerald*, 837 A.2d at 1030 ("The raison d'etre for treating a dog sniff as a non-search is that the binary nature of its inquiry, 'contraband "yea" or "nay"?,' precludes the possibility of infringing any expectation of privacy that society objectively considers to be legitimate."). On the other hand, the decision of the Florida Supreme Court in this case and the other lower court decisions which have found that a dog sniff at the front door of a home is a Fourth Amendment search properly consider the historical foundations of the Fourth Amendment and the sanctity of the home derived from those historical foundations, and properly recognize that *Place*, *Edmond*, *Jacobsen* and *Caballes* must be considered in the context of the particular police actions in those cases. *See* Pet.App. 14-23, 26-31; *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), *cert. denied*, 474 U.S. 819 (1985) and 479 U.S. 818 (1986); *State v. Rabb*, 920 So.2d 1175 (Fla. 4th Dist. Ct. App. 2006), *review denied*, 933 So.2d 522 (Fla.), *cert. denied*, 549 U.S. 1052 (2006).

Fourth Amendment search, even if the only details revealed are illegal activity.

2. The State of Florida's Proposed Rule Would Allow Highly Intrusive Searches of Individuals and Indiscriminate Random Searches of Homes So Long As the Searching Tool Reveals Only the Presence of Contraband.

The State of Florida argues that the prior holdings of this Court establish that the use of a well-trained narcotics detection dog, or any other searching tool which law enforcement officials might conceivably develop to reveal only the presence of contraband, cannot be considered a search under the Fourth Amendment under any circumstances. The State asks this Court to rule that "[u]nder this exception, any test, including a dog sniff, which merely reveals contraband, and no other private fact, compromises no legitimate privacy interest and, therefore, is not a search." Pet.Br. 16-17.

Justice Brennan warned against such a broad reading of this Court's prior decisions in his dissenting opinion in *Jacobsen*. If a dog sniff which only reveals contraband and no other private fact is not a search under any circumstances, then "law enforcement officers could release a trained cocaine-sensitive dog – to paraphrase the California Court of Appeal, a 'canine cocaine connoisseur' – to roam the streets at random, alerting the officers to people carrying

cocaine." *Jacobsen*, 466 U.S. at 138 (Brennan, J., dissenting) (citation omitted). "Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar . . . to the police setting up such a device on a street corner and scanning all passersby." *Id.* Or, "if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present." *Id.* Under the interpretation of the Fourth Amendment urged by the State of Florida in the present case, "these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire." *Id.* Justice Brennan expressed confidence in this Court's readiness to reject such a broad interpretation of the contraband exception when the context of the particular governmental search technique warranted such limitations. He noted that this Court's precedents establish "that this Court ultimately stands ready to prevent this Orwellian world from coming to pass." *Id.*

Justice Souter also warned against such a broad reading of this Court's decisions in his dissenting opinion in *Caballes*. Justice Souter noted that uncritical application of the contraband exception without consideration of the context of the government action "would render the Fourth Amendment indifferent to

suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks." *Caballes*, 543 U.S. at 411 (Souter, J., dissenting). Justice Souter also expressed confidence in this Court's willingness to limit the scope of the contraband exception:

> The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car, *ante*, at 838. For this reason, I do not take the Court's reliance on *Jacobsen* as actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car, about which Justice GINSBURG is rightly concerned, *post*, at 845-846, or on the person of any pedestrian minding his own business on a sidewalk.

Id. at 417.

Under the interpretation of the Fourth Amendment urged by the State of Florida in this case, suspicionless sniffs of children in school would not constitute searches and therefore could be freely pursued whenever law enforcement officers desire. The unsoundness of such a rule is demonstrated in *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982). In *Horton*, the court first noted that "the fourth amendment applies with its fullest vigor against any intrusion on the human body."

Horton, 690 F.2d at 478. The court then observed that "[o]ne can imagine the embarrassment which a young adolescent, already self-conscious about his or her body, might experience when a dog, being handled by a representative of the school administration, enters the classroom specifically for the purpose of sniffing the air around his or her person." *Id.* at 479. The Court described how the school officials used Doberman pinschers and German shepherds because of the image maintained by the large dogs, and how these dogs "walked up and down the aisles and stopped at every desk and sniffed on each side all around the people, the feet, the parts where you keep your books under the desk." *Id.* The court found the dog's sniffing technique, which consisted of "sniffing around each child, putting his nose on the child and scratching and manifesting other signs of excitement in the case of an alert" to be intrusive and held that the police action was "a search within the purview of the fourth amendment." *Id.* Under the Fourth Amendment test endorsed by the State of Florida in this case, such a dog sniff of a child in school would never constitute a Fourth Amendment search because the dog sniff reveals only the presence of contraband.[6]

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[6] It should be noted that in *Horton* no contraband was found on either of the two students who triggered an alert when they were subjected to the sniffing of the narcotics detection dogs. A small bottle of perfume was found on one of the students searched as a result of the alert by the narcotics detection dog. It appears that narcotics detection dogs trained to alert to the presence of cocaine do not actually alert to the cocaine itself but

(Continued on following page)

In addition, Florida's test would allow unlimited use of any current technology that detects only contraband or illegal activity to reveal details inside a home, and would create a significant incentive to law enforcement officials to develop new technology to reveal details inside the home. The State of Florida, and the states which have joined in the amicus brief filed in support of the State of Florida, readily acknowledge the intent of these States to use narcotics detection dogs as much as possible to search for contraband inside homes. *See* Pet.Br. 28 (characterizing narcotics dogs as "an irreplaceable tool" for detecting illegal activity inside homes); Amicus Br. Of States of Texas, *et al.* 9 (seeking reversal of the decision of the Florida Supreme Court "to ensure that detection dogs retain their proper place at the forefront of state and

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instead likely alert to the chemical methyl benzoate. *See United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars ($ 30,670.00)*, 403 F.3d 448, 458 (7th Cir. 2005) ("In addition, the research indicates that dogs do not alert to byproducts other than methyl benzoate and would not alert to synthetic 'pure' cocaine unless methyl benzoate was added."). Methyl benzoate is a common chemical used in multiple consumer products including perfume. *See Jacobson v. $ 55,900 in U.S. Currency*, 728 N.W.2d 510, 534-35 (Minn. 2007) (Hanson, J., concurring); *see also* Lunney, *"Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home"* 88 Or. L. Rev. 829, 839 (2009) (pointing out that the drug detection dog in *Horton* appears to have alerted to the bottle of perfume which was a lawful source of methyl benzoate, and arguing that "[b]ecause methyl benzoate is commonly found in the home, further scientific clarification concerning the reliability of canine home-sniffs is essential.").

federal efforts against production and distribution of illegal drugs."). Presumably, these States will be just as eager to use current technology and develop and use new technological innovations which will reveal only the presence of contraband inside a home.

The State of Florida seeks to ease these justifiable fears of the widespread use of narcotic detection dogs and other searching tools by pointing out the "practical limits" of law enforcement to use dogs in "time consuming random sweeps of entire neighborhoods" and that dogs are not "cheap and surreptitious devices that evade the ordinary checks of limited police resources and community hostility." Pet.Br. 27-28. In the first place, if police are given carte blanche authority to search constrained only by their good faith and limited resources, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers or effects' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964).

But beyond that, the broad searches that the State of Florida asks this Court to authorize would be much less of a strain on limited police resources than would current individualized searches based on probable cause developed by traditional means of police investigation. Indeed, randomly taking a narcotics detection dog up to the front door of selected houses in a suburban neighborhood, or taking a narcotics detection dog up to the front door of every apartment in an inner city apartment complex selected by the police, or walking a narcotics dog up and down the

halls of a school to sniff the students passing by, requires a relatively small investment of time and resources by police officers compared to more time-consuming traditional methods of police investigation.

The State of Florida accurately notes that dogs have been used to aid police investigations for many years. However, the paramount consideration in this case is the history of the Fourth Amendment, not the history of dogs used in police investigations. As demonstrated, the Fourth Amendment was based in large part on an individual's right to retreat inside his or her home secure in the knowledge that government officials could not find out what was inside that home without a warrant based on probable cause. There is no historical basis to suggest that if British officials had the ability to train dogs to detect only the presence of contraband tea, sugar, or pamphlets inside a colonial home, the use of dogs to detect these contraband items inside the home would have escaped censure by colonial residents. These residents were offended by the suspicionless searches of their homes and businesses by customs authorities under the writs of assistance regime, no matter how those searches were carried out. *See, e.g.,* Phillip Hubbart, *Making Sense of Search and Seizure Law* 21-24 (2005) and authorities collected.

Accordingly, this Court should reject the State of Florida's argument that the use of any tool which detects the presence of contraband under any circumstances is not a search, and hold that a police officer's

use of a trained narcotics detection dog at the front door of a home to obtain information regarding the interior of the home which the officer is unable to obtain using the officer's ordinary powers of perception without a physical intrusion, is a Fourth Amendment search requiring a warrant based on probable cause.

C. The Government's Use Of A Drug Detection Dog To Reveal Details Of The Home Constitutes A Fourth Amendment Search Even Though The Dog Does Not Physically Enter The Home And The Dog Only Detects Odors Emanating From The Front Door.

The fact that the narcotics detection dog reveals the details of the home without physically intruding inside the home does not establish that the use of the dog at the front door of the home is not a Fourth Amendment search requiring a warrant. A narcotics detector dog does the same thing as the thermal imaging device in *Kyllo* and the beeper in *Karo*; it reveals details of the home that would have been unknowable without physical intrusion into the home. That being the case, the use of the narcotics detection dog constitutes a search under the Fourth Amendment.

In *Karo* and *Kyllo*, this Court squarely addressed the question of whether a Fourth Amendment search of a home occurred where police officers did not physically enter the home. In each case, police obtained information about what was inside a home from a

lawful vantage point where the officer was unable to obtain such information using the officer's ordinary powers of perception. In *Karo*, this Court held that the use of the beeper to disclose the presence of the can of ether inside the home constituted a Fourth Amendment search because the beeper revealed details of the home that would previously have been unknowable without physical intrusion into the home. This Court found no difference between the acts of a government agent in entering the house to verify that the can of ether was inside and the surreptitious use of an electronic device to obtain that same information:

> In this case, had a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house. The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched.

Id. at 715. This Court acknowledged that the monitoring of a beeper is "less intrusive than a full search," but nevertheless held that such monitoring constitutes a Fourth Amendment search because "it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that *it could not have otherwise obtained without a warrant.*" *Id.* (emphasis added).

Similarly, in *Kyllo*, this Court addressed the question "whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment." *Id.* at 29. The scan of the home took only a few minutes and was performed from inside an agent's vehicle on the street outside the house. The scan showed that the roof over the garage and a side wall of the home were relatively hot compared to the rest of the home and substantially warmer than the other homes in the triplex.

This Court held that the use of the thermal imager to detect the relative amounts of heat within the home constituted a 'search' within the meaning of the Fourth Amendment. While acknowledging that "no 'significant' compromise of the homeowner's privacy" had occurred in the case, this Court pointed out that it was required to "take the long view, from the original meaning of the Fourth Amendment forward," and that long view mandated the conclusion that, "Where, as here, the Government uses a device that is not in general public use, to explore details of

the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.*

In this case, a police officer used a trained narcotics detection dog to obtain information regarding the interior of Mr. Jardines' home that the officer was otherwise unable to obtain using his ordinary powers of perception without a physical intrusion into the constitutionally protected area of the home. Detective Bartelt testified at the hearing on the motion to suppress that he only smelled mothballs when he was at the base of the front porch (T. 29).[7] Pursuant to *Karo* and *Kyllo*, this use of the trained narcotics detection dog to obtain the information from the interior of Mr. Jardines' home that would have been unknowable without physical intrusion is a Fourth Amendment

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[7] One of the other officers on the scene decided to approach the front door of the house after the drug detection dog was used to detect the odor of contraband emanating from the house, and that officer claimed that he smelled the odor of contraband at the front door of the house. The fact that an officer might have been able to detect the odor of contraband without using the drug detection dog is not relevant to the issue of whether the use of the drug detection dog was a search which violated the Fourth Amendment. In *Kyllo*, this Court found it "quite irrelevant" that outside observers might have been able to perceive the home without using the thermal imager, because "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo*, 533 U.S. at 35 n.2.

search and is presumptively unreasonable without a warrant based upon probable cause.

The State claims that a police officer's use of a narcotics detection dog is not a search because "[o]fficers routinely use tools such as field glasses, flashlights, and dogs as aids to their senses." Pet.Br. 22. However, field glasses and flashlights simply enhance a police officer's sense of sight. A narcotics detection dog, on the other hand, does not enhance any of the officer's senses. When the dog alerts it provides the officer with information that the officer could not otherwise discern without the use of the dog. Professor LaFave has so analyzed this issue:

> Because, so the argument goes, the cases have generally held that the use of a flashlight or binoculars to aid the natural senses does not constitute a Fourth Amendment search, it follows that it is not a search to resort to "canine assistance in pursuit of the criminal." This analogy is equally unsound. As Judge Mansfield noted in his concurring opinion in [*United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975)],
>
> > the police have been permitted to enhance or magnify the human senses with the aid of instruments such as binoculars or flashlights. . . . But that is not the case here where the "nose" being put into others' business was clearly an intrusion. The police agents here did not smell or see any contraband, nor were their senses enhanced. Their only indication that

> marijuana was present was the action of the dog. Their own senses were replaced by the more sensitive nose of the dog in the same manner that a police officer's ears are replaced by a hidden microphone in areas where he could not otherwise hear because of the inaudibility of the sounds. The illegality of the latter practice in the absence of a search warrant or special circumstances has long been established.
>
> A seemingly closer analogy is to the utilization of magnetometers and similar devices, which have consistently been held to amount to a search within the meaning of the Fourth Amendment.

1 Wayne R. LaFave, *Search & Seizure* §2.2(g) (4th ed. 2010) (footnotes omitted).

In his concurring opinion in *Place*, Justice Brennan recognized the qualitative difference between the use of a tool by the police to aid the natural senses and the use of a narcotics detection dog. Justice Brennan pointed out that "a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual's privacy." *Place*, 462 U.S. at 719-20 (Brennan, J., concurring).

The State of Florida also argues that the use of the narcotics detection dog at the front door of a home

is not a search because the dog only detects odors emanating from the house. Once again, this Court's decisions in *Karo* and *Kyllo* refute this argument. In *Kyllo*, the Government maintained that the thermal imaging was not a search because it detected only the heat radiating from the external surface of the house and did not detect any heat inside the home. *Kyllo*, 533 U.S. at 35. This Court found no constitutionally significant difference between revealing the contents of a home by "off-the-wall" observations and "through-the-wall" surveillance. *Id.* This Court noted that "just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house – and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house." *Id.* This Court further noted that "such a mechanical interpretation of the Fourth Amendment" had been rejected in *Katz* where the police used a device which detected only the sound waves that reached outside the phone booth. *Id.* This Court declared that even though the device used in *Kyllo* to detect the heat emanating from the house was "relatively crude," the rule adopted had to take into account "more sophisticated systems that are already in use or in development." *Id.* at 36 (footnote omitted). Finally, this Court firmly rejected the contention that anything learned about the content of a house by inference from information coming out of the house cannot be a search. This Court pointed out:

> [T]he novel proposition that inference insulates a search is blatantly contrary to *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawful.

Id. at 36-37 (footnote omitted).

This Court's decisions establish that a Fourth Amendment search of a home occurs even though police officers do not physically enter the home but rather from a lawful vantage point use a tool to obtain information about what is inside the home which the officer is unable to obtain using the officer's ordinary powers of perception. This Court's decisions further establish that a Fourth Amendment search of a home occurs even though police officers do nothing more than draw an inference as to what is inside a home from the perception of what is emanating from the house. Accordingly, the Government's use of a drug detection dog to reveal details of the home that would have been unknowable without physical intrusion constitutes a Fourth Amendment search even though those details are revealed through inferences drawn from the odors detected by the dog emanating from the house.

II. A DOG SNIFF AT THE FRONT DOOR OF A HOME BY A NARCOTICS DETECTION DOG IS A FOURTH AMENDMENT SEARCH REQUIRING A WARRANT BASED UPON PROBABLE CAUSE BECAUSE A POLICE OFFICER TAKING THE DOG TO THE FRONT DOOR OF THE HOUSE IS A COMMON LAW TRESPASS AND VIOLATES THE HOMEOWNER'S REASONABLE EXPECTATION OF PRIVACY.

Aside from a police officer's use of the narcotics detection dog to reveal details inside the home, the actions of a police officer in taking a narcotics dog to the front door of a home also constitute a Fourth Amendment search. The front door of a home and the area immediately adjacent to the front door are within the curtilage of the home, and thus warrant the Fourth Amendment protections that attach to the home. That being the case, the officer's approach to the front door of the home constitutes a Fourth Amendment search of the home for two reasons. First, a physical trespass onto the constitutionally protected curtilage of a home for the purpose of obtaining information is a search within the meaning of the Fourth Amendment. Second, a police officer's entry into the curtilage of the home with a narcotics detection dog violates the homeowner's reasonable expectation of privacy.

A. The Front Door Of A Home And The Area Immediately Adjacent To The Front Door Of A Home Are Within The Curtilage Of That Home.

The curtilage of the home is one of the constitutionally protected areas enumerated in the Fourth Amendment, and accordingly "warrants the Fourth Amendment protections that attach to the home." *Oliver v. United States*, 466 U.S. 170, 180 (1984); *Jones*, 132 S. Ct. at 953. "[T]he common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home." *Id.* (citing 4 W. Blackstone, Commentaries *225). This Court has defined curtilage as the "area intimately linked to the home, both physically and psychologically," *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986), as distinguished from "open fields," which "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver*, 466 U.S. at 179. "[A]n individual may not legitimately demand privacy for activities out of doors in fields, *except in the area immediately surrounding the home*." *Id.* at 178 (emphasis added). "*The curtilage area immediately surrounding a private house* has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986) (emphasis added). "[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining

the curtilage – as the area around the home to which the activity of home life extends – is a familiar one easily understood from our daily experience." *United States v. Dunn*, 480 U.S. 294, 302 (1987) (quoting *Oliver*, 466 U.S. at 182 n.12).

In *Dunn* this Court considered the issue of whether a barn which was located 60 yards from a home and which was not within the area enclosed by a fence surrounding the house was within the curtilage of the home. This Court identified four factors to be used as a reference in determining whether such an area outside the area immediately surrounding a private home falls within the curtilage of the home. These four factors are "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301. Applying those four factors to the barn and the area surrounding it, this Court had "little difficulty in concluding that this area lay outside the curtilage of the ranch house." *Dunn*, 480 U.S. at 301.

This Court's decisions clearly establish that the front door of a home and the area immediately adjacent to the front door of a home always fall within the curtilage of the home. *Oliver*, 466 U.S. at 178, 180; *Dow Chem. Co.*, 476 U.S. at 235. Accordingly, reference to the four-factor test for determining the extent of curtilage beyond the area immediately surrounding

a private home is unnecessary in this case. *See United States v. Charles*, 290 F.Supp.2d 610, 614 (D.V.I. 1999), *aff'd*, 29 Fed.Appx. 892 (3d Cir. 2002) ("Clearly, the doorknob on the defendant's front door of the Catherine's Rest residence is within the curtilage of the home.").

The police officer in this case took the narcotics detection dog directly to the front door of the house. The entranceway to the front door of the home was enclosed with an archway. Through the archway was the alcove of the porch outside the front door of the home. The entry of the archway was approximately six to eight feet from the front door of the home. *See* Resp. App. 1. In taking the narcotics detection dog through the archway, into the alcove, and up to the front door of the home the officer and the narcotics detection dog intruded into the curtilage of Jardines' home.

Not all police intrusions into the curtilage of a home constitute a Fourth Amendment search. "This is because a portion of the curtilage, being the normal route of access for anyone visiting the premises, is 'only a semi-private area.'" 1 LaFave, *supra*, at §2.3(f) (quoting *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975)). However, when a police officer intrudes into the curtilage of a home with a narcotics detection dog, that intrusion does constitute a Fourth Amendment search because the intrusion is a common law trespass for the purpose of conducting a search for evidence, and because the intrusion violates the

homeowner's reasonable expectation of privacy in the curtilage of the home.

B. A Police Officer's Approach To The Front Door Of A Home With A Narcotics Detection Dog Is A Fourth Amendment Search Because It Is A Common Law Trespass Upon A Constitutionally Protected Area For The Purpose Of Conducting A Search For Evidence.

When the Government physically trespasses upon the areas enumerated in the Fourth Amendment for the purpose of obtaining information, such a physical intrusion is a search within the meaning of the Fourth Amendment. *Jones*, 132 S. Ct. at 950 n.3. In holding that the Government's installation of a GPS device on a vehicle, and its use of that device to monitor the vehicle's movements, constitutes a Fourth Amendment search, this Court reaffirmed the significance of property rights in determining whether Government action constitutes a search under the Fourth Amendment:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

Id. at 949. To support this conclusion, this Court quoted the following expression by Lord Cameron in *Entick* of the importance of property rights in analyzing search and seizure issues:

> "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

Id. (quoting *Entick*, 95 Eng. Rep. at 817).

This Court noted its obligation to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Id.* at 950 (quoting *Kyllo*, 533 U.S. at 34). This Court further pointed out that "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id.* (footnote omitted). Accordingly, this Court concluded:

> [O]ur task, *at a minimum*, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.

Id. at 950 n.3 (emphasis in original). This Court identified the curtilage of a home as "one of those protected areas enumerated in the Fourth Amendment." *Id.* at 953. This Court emphasized that trespass alone into a constitutionally protected area does not constitute a Fourth Amendment search, but trespass coupled with "an attempt to find something or to obtain information" does constitute such a search. *Id.* at 953 n.5.

In this case, Detective Bartelt and the narcotics detection dog set foot upon Mr. Jardines' property without his consent and therefore trespassed on that property. A person who enters upon the property of another is not a trespasser if consent to enter may be implied from custom, usage, or conduct. These principles are explained in 2 Cooley on Torts, 4th ed., p. 238, §248, where it is stated:

> Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit; the mechanic extends the like invitation to those who may have occasion to become his customers; the physician and the lawyer invite them to their respective offices, and so on * * * No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise. *So every man, by implication, invites others to come to his house as they may have proper occasion, either of business, or courtesy, for information, etc. Custom must*

> *determine in these cases what the limit is of the implied invitation.*

(emphasis added); *see also Prior v. White*, 132 Fla. 1, 180 So. 347, 355 (1938); *Florida Pub. Co. v. Fletcher*, 340 So.2d 914, 916 (Fla. 1977); 75 Am.Jur.2d *Trespass* §73 (2007); Restatement (Second) of the Law of Torts, §167, cmt. d (1965).

Thus, a salesperson, a person delivering a package, a young girl selling Girl Scout cookies, or possibly even a police officer intending to speak to an occupant of the house, are not trespassers because they have an implied invitation by custom to approach the front door of a house for the purpose of speaking to the occupant of the house. However, the implied invitation by custom to approach the front door of a house is not unlimited. In his concurring opinion in this case in the Third District Court of Appeal of Florida, Judge Gerald B. Cope, Jr., discussed the limitations on the implied invitation by custom to approach the front door of a house:

> Although the walkway, driveway, and porch are part of the homeowner's private property, the owner "by implication, invites others to come to his house as they may have proper occasion, either of business, or courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation." *Prior v. White*, 132 Fla. 1, 180 So. 347, 355 (1938) (italics and internal quotation marks omitted). The homeowner may expect a knock at the door from a seller of

> goods, a solicitor of charitable contributions, or a neighbor on a social call. The postal service will deliver the mail and a delivery truck may drop off a package.
>
> On the other hand, there is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows. The vendor who may hawk his goods during daylight hours is not welcome to knock at the door at two o'clock in the morning.

Pet.App. 124-25.

While a police officer may have an implied invitation by custom to approach the front door of a house for the purpose of speaking to the occupant of the house, no such implied invitation by custom exists for an officer to approach the front door of a house with a narcotics detection dog for the purpose of searching for otherwise undiscoverable evidence. That being the case, Detective Bartelt and the narcotics detection dog set foot upon Mr. Jardines' property without his consent and therefore they were trespassers on that property. Moreover, because the detective took the narcotics detection dog to the front door of the house and the area immediately adjacent to the front door which was within the curtilage of the home, the Government trespassed onto a constitutionally protected area. Finally, because the detective indisputably

approached the front door of the house with the narcotics detection dog in an attempt to obtain information, that trespass into a constitutionally protected area constitutes a Fourth Amendment search. A search of a home without a warrant supported by probable cause is presumptively unreasonable. *Kyllo*; *Payton*. Accordingly, a police officer taking a trained narcotics detection dog to the front door of a home is a Fourth Amendment search requiring a warrant based upon probable cause.

C. A Police Officer's Approach To The Front Door Of A Home With A Narcotics Detection Dog Is A Fourth Amendment Search Because It Violates The Homeowner's Reasonable Expectation Of Privacy In The Curtilage Of The Home.

Notwithstanding the fact that the front door and the area immediately adjacent to the front door of a home are within the curtilage of that home, a homeowner has a reduced expectation of privacy in that area. As this Court recently noted, "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011). The following statement is often quoted in cases involving the authority of police officers to approach the front door of a home with the intent to question the occupant of the home:

> Absent express orders from the person in possession against any possible trespass,

> there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' *with the honest intent of asking questions of the occupant thereof* – whether the questioner be a pollster, a salesman, or an officer of the law.

Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964) (emphasis added). In reaching this conclusion, the court distinguished the situation where a police officer approaches the front door of a house with the intent to question the occupant from the situation "wherein the intent of the several officers at the time of their entry on the premises without possessing a legal warrant for search or arrest, was actually either to arrest without warrant or search without warrant." *Davis*, 327 F.2d at 304; *see also United States v. Ochoa-Almanza*, 623 F.2d 676, 677 (10th Cir. 1980) (distinguishing *Davis* based on "the fact that the officers went to the door with the intent to search" and noting that the *Davis* court "emphasized that the officers did not have any intent to search."); *Madruga v. County of Riverside*, 431 F.Supp.2d 1049, 1058 (C.D. Cal. 2005) (finding deputy's approach to front door of home invaded homeowner's reasonable expectation of privacy because deputy "did not want to talk, he wanted to detain. The same cannot be said of other persons who use the same causeways to and from the home's front door, be they salespersons, trick-or-treaters, or deliverymen.").

In his concurring opinion in this case in the Third District Court of Appeal of Florida, Judge Cope illustrated this distinction between a police officer who approaches the front door of a house with the intent to question the occupant and a police officer who approaches the front door of a house for the purpose of searching for evidence:

> Turning to crime investigation, it is perfectly acceptable for a detective to come to the front door to speak with the owner. Where the officer has come to the front door to speak to the owner, there is no expectation of privacy regarding any incriminating objects the owner has left in plain view, or in any odors (such as marijuana) that may be emanating from the dwelling. . . . But here, too, there are limits. A crime scene investigation unit cannot (absent consent or a warrant) cordon off the front porch and begin dusting the porch for fingerprints, or conduct a microscopic examination for blood stains, or deploy a magnetometer or sonar to determine what lies beneath the porch.
>
> In short, it is inaccurate to say that there is never any reasonable expectation of privacy with regard to the front porch of a house, although it is a more reduced expectation than applies to the house interior.

Pet.App. 125-26.

Thus, a salesperson, a person delivering a package, a young girl selling Girl Scout cookies, or a police officer intending to speak to an occupant of the house,

do not invade the homeowner's reasonable expectation of privacy when they enter the curtilage of the home. However, a police officer who approaches the front door of a home to search for evidence invades the homeowner's reasonable expectation of privacy. This Court has recognized that a police officer's actions with respect to private property, taken for the purpose of searching for evidence, can constitute a Fourth Amendment search even though the owner of the property has no reasonable expectation of privacy that the general public or a police officer would not interfere with the property without such purpose. In *Bond v. United States*, 529 U.S. 334 (2000) this Court considered the issue of whether a law enforcement officer's physical manipulation of carry-on luggage in the compartment above a bus passenger's seat constituted a Fourth Amendment search. This Court concluded that the officer's physical manipulation of the luggage was a Fourth Amendment search because it violated the bus passenger's reasonable expectation of privacy:

> When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical

> manipulation of petitioner's bag violated the Fourth Amendment.

Bond, 529 U.S. at 338-39.

When a police officer approaches the front door of a home with a trained narcotics detection dog for the purpose of detecting odors emanating from the front door of the house, that officer is indisputably searching for evidence and thus invades the homeowner's reasonable expectation of privacy in the home. Consequently, a police officer's approach to the front door of a home with a narcotics detection dog is a Fourth Amendment search of the home requiring a warrant based on probable cause.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

CARLOS J. MARTINEZ
Public Defender
ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA

MARIA E. LAUREDO
Chief Assistant Public Defender

HOWARD K. BLUMBERG*
Assistant Public Defender
hblumberg@pdmiami.com

ROBERT KALTER
Assistant Public Defender

1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

Counsel for Respondent

**Counsel of Record*



App. 2

[06-40839]

MTN TO SUPP

IN THE
CIRCUIT/COUNTY COURT
IN AND FOR MIAMI-DADE
COUNTY FLORIDA

CASE NO. F06-40839

DEFENDANT(S)

J. JARDINES

STATE'S	DEFENDANT'S
☑	☐

COURT'S
☐

FILED:
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REPLY BRIEF

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BRIEFS

Supreme Court, U.S.
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No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR THE STATE OF FLORIDA

PAMELA JO BONDI
Attorney General of Florida
Tallahassee, Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
Timothy D. Osterhaus
Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
COUNSEL FOR PETITIONER

Law Library

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No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF FOR THE STATE OF FLORIDA

Neither Respondent Jardines nor the *Amici* provide a convincing reason why the Court should abandon the basic rule that a dog sniff by a trained drug detection dog is not a Fourth Amendment search. *See United States v. Place*, 462 U.S. 696, 707 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005). The simple truth is that whether a dog sniff takes place outside a house, a car, or a piece of luggage, it uniquely reveals just a single bit of information—whether the odor of contraband is present. In fact, Jardines does not dispute that the sniff in this case revealed "only ... unlawful activity." Resp. Br. 29. In other words, the sniff invaded no legitimate expectation of privacy.

That the context here is the front porch of a house does not merit a departure from the well-settled contraband rule. No reasonable expectation of privacy or common law trespass exists, for instance, on the ordinary path to the front door of a house. Jardines himself concedes that a broad "implied invitation" extends to salespersons, delivery persons, Girl Scout cookie sellers, and even police officers to approach the front door of a house. Resp. Br. 54. And where police may lawfully approach, knock, and interview residents at their front door, this Court has never restricted them from traditional sense-enhancing tools. Even Jardines agrees that officers may employ field glasses and flashlights. Resp. Br. 43.

Additionally, the officers' use of a common detector dog on the front porch of a house does not trigger Fourth Amendment problems akin to invading the "inside" of a house with an uncommon high-tech device. *See, e.g., United States v. Jones*, 123 S. Ct. 945 (2012); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Karo*, 468 U.S. 705 (1984). Law enforcement has used detector dogs for centuries past and repeatedly with this Court's blessing. With this history in view there can be no reasonable concern that upholding the sniff in this case will propel invasive technologies forward, or suddenly open the floodgates to sweeping columns of

searching dogs. In sum, nothing should keep this Court from applying the simple principle of *Place*, *Edmond*, and *Caballes* to uphold the dog sniff at issue here.

I. The Dog Sniff Was Not A Fourth Amendment "Search" That Violated Jardines' Reasonable Expectations Of Privacy Because It Only Revealed Contraband.

A. The Court Should Reject Jardines' Challenge To The Fourth Amendment Contraband Rule.

Jardines asserts that the detector dog sniff violated the Fourth Amendment even though it revealed details "related only to unlawful activity." Resp. Br. 29. In his view, the Fourth Amendment protects even the escaped contraband odor of his many marijuana plants because he "s[ought] to keep [it] private within the home." Resp. Br. 16, 19.

Of course, this Court has recognized an opposite principle: That individuals have no "legitimate privacy interest" in contraband because it is illegal to possess it. *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *Caballes*, 543 U.S. at 408-409 (quoting *Place*, 462 U.S. at 707 & *Jacobsen*). In fact, for nearly three decades the Court has said that dog sniffs are not a search

because they can reveal *only* the presence of illegal contraband. *Place*, 462 U.S. 696; *Edmond*, 531 U.S. 32; *Caballes*, 543 U.S. at 408-09 (characterizing dog sniffs as "*sui generis*"). Certainly the defendants in *Place*, *Edmond*, and *Caballes* had the very same goal as Jardines to conceal "details" of their contraband within their "private" luggage and cars.

Jardines' argument essentially is that 'a house is different.' Resp. Br. at 25-28. But this Court did not base its prior dog sniff decisions on the *thing* that holds or conceals illegal narcotics, but on the unique fact that dog sniffs reveal only contraband. *Place*, 462 U.S. at 707; *Edmond*, 531 U.S. at 40; *Caballes*, 543 U.S. at 408-09. The modest information gleaned from dog sniffs also separates it from the trio of cases Jardines cites for the principle that "all details in the home are held safe from prying government eyes." Resp. Br. 21. In *Karo and Hicks*, the government physically invaded the home and obtained private information—clearly a Fourth Amendment problem. And in *Kyllo* they could detect "perfectly lawful activity" going on inside the home using a high-tech imagery device on the outside. The dog sniff here—which, as discussed *infra*, was made from an area where officers had a legal right to be—has neither problem. The court should apply its dog sniff precedents to the context here because the sniff revealed only contraband (as

Respondent admits, Resp. Br. 29), without disclosing lawful goings-on inside the home, or making physical entry.

In sum, a dog sniff made outside a house should be considered no different from those in *Place*, *Edmond*, and *Caballes*; it "reveals no information other than the location of a substance that no individual has any right to possess [and] does not violate the Fourth Amendment." *Caballes*, *543 U.S.* at 410.

B. *Amici's* New Arguments Against The Contraband Rule Were Not Argued Or Factually Developed Below And Should Be Rejected.

Amici make two new arguments related to the dog sniff contraband rule that should not be entertained for the first time now. First, they argue that the contraband rule does not apply to drug-detection dogs because they can alert to legal substances. Loyola Br. 18-32; NACDL Br. 11-15. Next, an *amicus* argues that dog sniffs of houses are not reliable because of the distances involved with the sniffs. Loyola Br. 32-34.

Because these arguments are presented for the first time now and without a supporting evidentiary basis, they should not be considered. This Court generally does not entertain original

claims raised by parties at this point in a case, much less *amici*. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60, n.2 (1981) (declining to consider an *amicus'* argument "since it was not raised by either of the parties here or below"); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (noting that this "is a court of final review and not first view"). Jardines did not raise these arguments in the state appellate courts, in his brief in opposition filed in this Court, or in his merits brief filed in this Court. Nor were they ruled upon by the Florida Supreme Court.

In any event, *amici's* research appears to show the opposite—that dogs do not alert to anything but drugs. *See e.g.,* Kenneth G. Furton, et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147, 153 (2002). Professor Furton, one of the experts relied upon by *amici*, for example, noted that perfume odors containing methyl benzoate are "quite different" and can be "readily" distinguished by drug-detection dogs. *Id.* at 154-155. *Amici* offer no persuasive reason why this logic would not extend to other substances as

well.[1] This Court should not attempt to address this new issue without a record.

Moreover, the argument that dog sniffs of houses are not reliable due to the distance involved was affirmatively waived in the state courts. When directly questioned during the oral argument in the Florida Supreme Court, counsel for Jardines stated that he was not challenging the detector dog's accuracy.[2] That is why the record is silent on this issue. *Amici* may not raise

---

[1] One *amicus* implies that heroin-detection dogs will mistakenly alert upon vinegar instead of heroin. Loyola Br. 26-29. The dissertation cited, however, states explicitly that drug-detection dogs do not alert to vinegar. Michael S. Macias, *The Development of an Optimized System of Narcotic and Explosive Contraband Mimics for Calibration and Training of Biological Detectors*, (May 27, 2009) (Ph.D. dissertation, Fla. Int'l Univ.), available at http://digitalcommons.fiu.edu/etd/123, 115-118 (stating "as expected, none of the canines (0 of 14) showed interest in pure acetic acid or pure salicylic acid samples."). Informal studies also establish that marijuana-detection dogs do not mistakenly alert to hemp. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735, 756 n.77 (noting that the authors, who were critical of the dogs' accuracy, informally tested a drug-detection dog, which did not mistakenly alert and was rather "uninterested in hemp products").

[2] The oral argument is available online at http://wfsu.org/gavel2gavel/archives/flash/08-2101.php

an argument affirmatively waived by a party. *Cf. Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000) (observing that it is the party's case, not a joint appeal by the party and amicus; rather, the party must raise the issues it wishes the court to address); *see also Illinois v. Gates*, 462 U.S. 213, 221, 224 (1983) (refusing to consider an issue where the record was inadequate). What is more, the issue in *this* case is not about the reliability of dog sniffs, but whether a sniff outside a house violates reasonable expectations of privacy.

II. The Dog Sniff Did Not Convert To An Unlawful Search Or Trespass Just Because It Involved A House.

Jardines asserts that *Place*, *Edmond*, and *Caballes* do not apply because this case involves the revelation of "Details Inside the Home." Resp. Br. 26, 29. His argument is that dog sniffs involving a house are categorically different, even if, as he concedes, the only detail revealed by a dog sniff is "unlawful activity." *Id.* at 29.

A. The Detector Dog Did Not Operate "Inside The Home."

At the outset, it is important to clarify that even though Jardines' Brief talks of the revelation of details "inside the home" more than

a dozen times, the dog sniff in this case did not involve any physical entry into Jardines' house. Just as in *Place*, *Edmond*, and *Caballes*, where the dogs did not physically enter into private luggage or cars, this case did not involve a physical intrusion "inside the home" as Jardines' brief implies. Instead, the detector dog and his officer handler only briefly walked up to the house's front door along the customary path. The dog alerted and then left the scene with his officer-handler. The dog's alert was used thereafter as a basis for obtaining a warrant to enter the house.

Moreover, the dog sniff here revealed only the presence of contraband narcotics in the air *outside* the front door where the officer and dog were lawfully present. In this way, the sniff was "much less intrusive than a typical search" sparing the owner "the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Place*, 462 U.S. at 707.

B. The Police Officers Were Lawfully Present On Jardines' Front Porch.

Jardines extends his 'house is different' argument, for the first time in this case, beyond detector dogs. He argues that observations and evidence-gathering by the police officers

themselves constitute a Fourth Amendment search if made on the front porch of a house. Resp. Br. 16, 19; *see also id.* 48 (curtilage argument). Whereas at once Jardines concedes that officers—like salespersons, delivery persons, and Girl Scouts—have an implied invitation to approach a house "to speak to an occupant" (Resp. Br. 54), he states in broad fashion that "Police Action Which Reveals Any Detail An Individual Seeks To Keep Private Within The Home Is A Fourth Amendment Search." *Id.* 16; *see also id.* 19 (asserting the same as to "government activity").

As a threshold matter, it is a new argument for Jardines to assert that the officers' visit alone, without a detector dog, constituted a Fourth Amendment search. This argument was not made in the state courts and should not be entertained now. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1430 (2012) (observing that ours is "a court of final review and not first view" and that "we do not decide in the first instance issues not decided below."). His objection in the state courts was based totally on the detector dog, not the conduct of the two officers. Indeed, Jardines conceded, in his initial brief to the Florida Supreme Court, that the homeowner's implied invitation to visitors applied equally to law enforcement officers subject only to reasonable limitations such as the

hour of the day or night. IB 34-36; RB 6.[3] Jardines also conceded at the oral argument in the Florida Supreme Court that the officers going to the porch did not violate any expectation of privacy.[4] So Jardines' claim now that the officers' conduct itself was an invasion of privacy is being raised for the first time and should be rejected.

Moving on, Jardines incorrectly claims that a Fourth Amendment search occurs whenever "any detail an individual seeks to keep private" about his home is revealed. Resp. Br. 16, 19. For instance, this Court has never granted a privacy or possessory interest in odors, contraband or not, that waft outside where any invitee can smell them. *See, e.g., Kentucky v. King*, 131 S.Ct. 1849 (2011) (involving officers who happen upon a strong scent of marijuana emanating from an apartment).[5] *Ciraolo, Horton,* and *Dickerson*

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[3] Jardines' initial brief in the Florida Supreme Court is available on at http://www.floridasupremecourt.org/clerk/briefs/2008/2001-2200/08-2101_Ini.pdf
Jardines' reply brief in available online at http://www.floridasupremecourt.org/clerk/briefs/2008/2001-2200/08-2101_Reply2.pdf.

[4] The oral argument is available online at http://wfsu.org/gavel2gavel/archives/flash/08-2101.php

[5] Respondent notes that the one officer who approached Jardines' front door claimed *himself* to smell the

have not been overruled; the plain view doctrine is alive and well. *See California v. Ciraolo*, 476 U.S. 207, 212 (1986) (rejecting a challenge to "the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation"); *Horton v. California*, 496 U.S. 128, 136 (1990) (recognizing the plain view exception to the warrant requirement but noting it is "an essential predicate" to the exception that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"); *Minnesota v. Dickerson*, 508 U.S. 366, 375-377 (1993) (expanding the plain view doctrine to include its sibling the plain feel doctrine). And under its sibling 'plain smell doctrine,' what an officer-invitee smells outside a house is not a search and is properly considered as the basis for a search warrant of a house. *United States v. Ventresca*, 380 U.S. 102, 104, 111 (1965) (finding probable cause to issue a search warrant of a house based on agents smelling odor of fermenting mash when walking on a sidewalk in front of house because a "qualified officer's detection of the smell of mash has often been held a very strong factor in

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contraband, while the other officer standing further back smelled only the mothballs lying at the base of the front porch. Resp. Br. 42 n.7; *id.* at 3.

determining that probable cause exists so as to allow issuance of a warrant.").[6]

Furthermore, Jardines' argument to keep officers from gathering incriminating information in areas in front of a home that are open to invitees does not comport with this Court's decisions. *See Kentucky v. King*, 131 S.Ct 1849, 1862 (2011) (observing that when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) (Breyer, C.J.) ("A policeman may lawfully go to a person's home to interview him."). Generally on-duty officers do not make house calls to chit-chat. The expected purpose of any "knock and talk" would be to gather evidence via conversation. And there is no discernible difference between interviewing and gathering evidence from a resident. One is often merely a form of the other. So the officers' investigative actions in walking to the door and knocking while looking, listening, feeling and smelling for criminality along the way, did not transform their lawful investigation into a search.

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[6] The detector dog here was a qualified marijuana-detection dog just like the qualified agents in *Ventresca*. In fact, Jardines conceded in state court that Franky, the dog in this case, was a well-trained, drug-detection dog.

By the same token, Jardines is incorrect that this case involves a trespass. Resp. Br. 47. Under the custom exception to the common law of trespass, a person going to the front door is not committing trespass.[7] This is an age-old proposition. As Chief Justice Holmes explained, when sitting on the Massachusetts Supreme Court, approaching a house for the social purpose of visiting is "familiar to every one" and a "practice common in this part of the world" and therefore, "entry upon another's close, or into his house, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass." *Riley v. Harris*, 58 N.E. 584, 584 (Mass. 1900) (Holmes, C.J.). Rather, a person using the common path to the front door of a

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[7] *Abbott v. Weekly*, 1 Lev. 176, 83 Eng. Rep. 357 (K.B. 1665) (concluding there was no trespass from dancing on the plaintiff's close based on custom because the villagers had held dances there from "time out of memory"); *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.)(holding that the defendants, who took mussels from a stream on the plaintiff's land, were not trespassers as a matter of law; rather, they may be licensees, noting that there were exceptions to the strict rule of the English common law as to entry upon a close based on American custom and habits.); *cf. McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring) (distinguishing between officers being admitted as guests to a rooming house, who like "any other stranger, could then spy or eavesdrop on others without being trespassers" and trespassing).

house, is an invitee. *United States v. Redmon*, 138 F.3d 1109, 1130 (7th Cir. 1998) (en banc) (Posner, J., dissenting) (explaining that police officers must confine themselves to the prescribed route rather than roaming the property at will); *cf. Maryland v. Macon*, 472 U.S. 463, 470 (1985) (explaining that a government agent may enter an open business in the same manner as a private person). The officers here did not trespass by straying from the common path to the front door.[8] *See* Pet. App A31, A112 (noting that the police officers were lawfully in place).

C. The Detector Dog Was Lawfully Present With The Police Officers On Jardines' Front Porch.

Furthermore, the presence of a detector dog's nose did not transform the officers' visit into a Fourth Amendment problem. That is, first, as

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[8] The dissenting Florida district court opinion upon which Jardines relies lists officer conduct that might violate the curtilage of a home along the common path to the front porch. Resp. Br. 58. But those observations help Jardines not one whit. The officers here did not cordon off the front porch; they did not dust for fingerprints; and they did not deploy a magnetometer or sonar. Rather, one of the two officers knocked on the front door. And approaching and knocking on the front door is not a trespass and does not violate a resident's reasonable expectation of privacy.

discussed above, the officers' investigative actions in walking to the door to knock, while making observations along the way is not a search. And, by extension, the affirmative decision to take a drug-detection dog along to assist their ability to sniff odors did not transform the investigation into a search.

Just as the officers might have used eyeglasses or a flashlight on the common path to the door, detector dogs have been used for centuries to enhance the ability of law enforcement to smell molecules in the air. *See, e.g., United States v. Dunn*, 480 U.S. 294, 305 (1987) (use of a flashlight "did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment") (citing *Texas v. Brown*, 460 U.S. 730, 739-740 (1983) & *United States v. Lee*, 274 U.S. 559, 563 (1927)). Respondent himself concedes that officers may use sense-enhancing aids like field glasses and flashlights. Resp. Br. at 43. A detector dog is little different. As with the presence of the officers' own noses, the use of a dog's nose when the officers were lawfully present on the front porch does not transform this case into a Fourth Amendment problem. *See Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B.1765) (under common law a dog's nose, like a human eye, cannot be guilty of trespass); *Kyllo*,

533 U.S. at 32 (examining "the portion of a house that is in plain public view" is "no search at all.").

In addition, it is the officer's objective actions of walking to the front door and knocking on it, not their decision to bring along a detector dog, which is relevant to the Fourth Amendment analysis. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (rejecting an argument that the shift in purpose from a traffic stop to a drug investigation was a search). *Bond v. United States*, 529 U.S. 334, 338, n.2 (2000) (explaining that an officer's subjective intent is "irrelevant in determining whether that officer's actions violate the Fourth Amendment ...; the issue is not his state of mind, but the objective effect of his actions"); *Whren v. United States*, 517 U.S. 806, 813 (1996) (stating that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Ciraolo*, 476 U.S. at 212 (rejecting an argument that the investigation itself amounted to a search because the flight was not a routine patrol); *Rhode Island v. Innis*, 446 U.S. 291, 301-302 (1980) (holding that a police officer's subjective intent to obtain incriminatory statements is not relevant to determining whether an interrogation has occurred). Jardines argument, that the officers' purpose in taking the dog to smell for marijuana (Resp. Br. 51) amounts to a search is incorrect and hearkens back to the inadvertence

requirement abandoned by this Court over two decades ago. *Horton*, 496 U.S. 128 (holding there is no inadvertence requirement to the plain view doctrine). The officers' decision to approach and knock on the front door with a detector dog was neither an invasion of privacy nor a trespass.

D. The Dog's Sniff On The Front Porch Does Not Present The Same Fourth Amendment Concerns As This Court Addressed In The High-Tech Device Cases.

Finally, Jardines relies heavily upon *Kyllo* and *Karo* to support his assertion that an outside sniff by a detector dog "intru[des] into the home" and constitutes a Fourth Amendment search. Resp. Br. 39. But Jardines' attempt to group this case with these other "house" cases does not tell the whole story.

In the first instance, the Court in *Caballes* found dog sniffs to be "entirely consistent" with this Court's decision in *Kyllo*. *Caballes*, 543 U.S. at 409-10. Specifically, the Court distinguished *Kyllo's* imaging device that was capable of detecting "perfectly lawful activity," from a "dog sniff ... that reveals no information other than the location of a substance that no individual has any right to possess [and] does not violate the Fourth Amendment." *Id.* at 410. The "critical" distinction between the use of a dog sniff and the

use of thermal imaging technology to survey a house is in what they detect. The device in *Kyllo* was capable of detecting "intimate details" of a home, "such as at what hour each night the lady of the house takes her daily sauna and bath." *Id.* A detector dog's sniff outside the front door reveals no perfectly lawful intimate details inside the home, but only whether the odor of contraband has wafted outside.

Karo, on the other hand, involved the use of a tracking beeper device that physically invaded a home and "reveal[ed] critical fact[s] about the interior of the premises." *Id.* at 715. The Court held that government could not "obtain information that it could not have obtained by observation from outside." *Id.* In this last statement, Jardines' case is perfectly distinguished. The dog sniff here occurred outside the home in an area where the officers were permitted to be. Different from *Karo*, the dog *never* entered Jardines' house and did not reveal details about the inside of the house, but only that the air outside contained the odor of contraband.

Kyllo, Karo, and Jones v. United States also are different because they involve advanced technology and not a centuries-old, traditional

tool of law enforcement.[9] In this series of cases, this Court has been concerned about the Government's use of high-tech devices, such as the thermal imager in *Kyllo* and the GPS tracking device in *Jones*, eroding the traditional protection embodied in the Fourth Amendment. As the majority opinion in *Kyllo* noted, technology has the ability "to shrink the realm of guaranteed privacy" and to leave a "homeowner at the mercy of advancing technology." *Kyllo*, 533 U.S. at 34, 35. And as the concurring opinion in *Jones* noted, "new technology" provides increased convenience but "at the expense of privacy" and the "emergence of many new devices" permits easy and cheap monitoring of a person's movement in a manner that was not previously likely due to the time and expense that would have been required. *Jones*, 132 S. Ct. at 962-964 (Alito, J., concurring).

In contrast, dogs are not an advancing technology that would increasingly threaten privacy. While training methods may have improved over the centuries, dogs simply do not present the same concerns or potential for

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[9] Dogs have been used by English constabularies to assist in police work from the time of the Middle Ages. *See United States v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency ($1,032,980.00)*, 2012 WL 684757, 35 (N.D.Ohio 2012).

invasiveness as do these other emerging, high-tech devices.

CONCLUSION

The Florida Supreme Court's decision should be reversed.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300

COUNSEL FOR PETITIONER

AMICUS CURIAE BRIEF

No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

JOELIS JARDINES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

NICOLE A. SAHARSKY
Assistant to the Solicitor General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a trained narcotics-detection dog's sniff at the front door of a suspected grow house is a Fourth Amendment search.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a trained narcotics-detection dog's sniff at the front door of a suspected grow house is a Fourth Amendment search. Because United States law enforcement agencies use trained dogs to detect illegal narcotics in a variety of circumstances, and because the federal government prosecutes cases in which state authorities obtain evidence using those dogs, the Court's resolution of the question presented will affect federal criminal investigations and prosecutions.

STATEMENT

1. Detective William Pedraja of the Miami-Dade County Police Department received a "crime stoppers" tip that marijuana was being grown at respondent's resi-

dence. Pet. App. A5; J.A. 49, 76-77, 154. Based on this tip, Detective Pedraja went to the residence with other officers and initiated surveillance. Pet. App. A5; J.A. 49-50, 77, 154-155. Two Miami police officers established perimeter positions around the residence, and federal Drug Enforcement Administration (DEA) agents provided backup. Pet. App. A32.

Detective Pedraja observed that there were no vehicles in the driveway, the window blinds were closed, and there was no activity at the residence for fifteen minutes. Pet. App. A5; J.A. 49-50. These observations were consistent with the use of the residence as a "grow house" for marijuana. As Detective Pedraja later explained, persons running grow houses "don't want to be seen by neighbors" and typically have "no traffic" because "[t]hey are not selling or buying from that residence." J.A. 88-89.

After fifteen minutes of observation, Detective Pedraja approached the front door of the residence, planning to knock on the door and seek consent to enter the house. Pet. App. A5; J.A. 50. He was accompanied by a police dog, Franky, and Franky's handler, Detective Douglas Bartelt. Pet. App. A5; J.A. 50, 77, 93-94. Franky had been trained to detect marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy. J.A. 54. When Franky detects the odor of one of those substances, the dog tracks the odor to its strongest point and sits down. J.A. 54, 95-96.

Detective Bartelt placed Franky on a leash and walked the dog toward the front door of the home, with Detective Pedraja following behind. Pet. App. A5-A6; J.A. 77-78. The officers walked up the driveway and onto a walkway that led to a small porch. See J.A. 94-95. Detective Bartelt stopped at the entrance to the porch,

about six to eight feet from the front door, and allowed Franky to sniff the area. J.A. 80-81, 90, 95-96.

Franky crossed the threshold of the porch and immediately began tracking an airborne odor. J.A. 94-97. Franky then sat down at the base of the front door. Pet. App. A6; J.A. 98. Detective Bartelt signaled to Detective Pedraja that the dog had given a positive alert for narcotics, then returned to his vehicle. J.A. 81, 98-99.

At the front door, Detective Pedraja independently "smelled the scent of live marijuana" emanating from the residence. J.A. 81; see J.A. 50; Pet. App. A6. He knocked on the front door, but no one answered. J.A. 50, 82, 155. Detective Pedraja observed that the air conditioning unit at the residence had been running constantly for fifteen minutes, without cycling off. J.A. 50, 82. At grow houses, the air conditioning often runs constantly to offset the tremendous heat generated by high-intensity light bulbs. J.A. 82-83.

Based on Franky's alert and his own observations, Detective Pedraja sought a warrant to search the house. Pet. App. A6, A9. In his affidavit, Detective Pedraja detailed his substantial experience investigating indoor marijuana laboratories and listed the facts establishing probable cause that marijuana was being grown in the house. J.A. 44-56. Those facts included the crime stoppers tip; Franky's alert; Detective Pedraja's smelling marijuana at the front door; and the constant running of the air conditioner. J.A. 48-50. The affidavit also detailed Franky's training, certification, and past reliability in detecting controlled substances. J.A. 50-54. DEA agents maintained surveillance at the residence while Detective Pedraja sought the warrant. Pet. App. A38.

A judge issued the warrant. Pet. App. A6, A9. When police executed the warrant, they found numerous live

marijuana plants, as well as equipment used to grow those plants. Pet. App. A1, A9, A77. The police arrested respondent as he fled out the back door of the house during the search. *Id.* at A38-A39. Respondent confessed orally and in writing. J.A. 59.

2. Respondent was charged in Florida state court with felony drug trafficking and felony grand theft (for stealing electricity to run the grow house). See Record of Appeal 5-8. He moved to suppress the evidence obtained during the warrant-authorized search of his residence on the ground that Franky's sniff was a Fourth Amendment search requiring probable cause. J.A. 60-63. The trial court held an evidentiary hearing, where Detective Pedraja and Detective Bartelt testified. J.A. 66-152.

The trial court granted the suppression motion on the ground that the dog sniff at the front door of respondent's residence "constituted an unreasonable and illegal search." Pet. App. A137 (relying on *State* v. *Rabb*, 920 So. 2d 1175 (Fla. 4th Dist. Ct. App.), review denied, 933 So. 2d 522 (Fla.), cert. denied, 549 U.S. 1052 (2006)). The court also decided that, without Franky's alert, the remaining facts were insufficient to establish probable cause that marijuana was being grown in the house. *Id.* at A138.[1]

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[1] The court rejected the State's argument that the evidence had an independent source based on Detective Pedraja's observations at the front door, stating that those observations "only confirm[ed] what the detection dog had already revealed." Pet. App. A138 n.1. The court of appeal disagreed, *id.* at A117-A120, but the Florida Supreme Court affirmed the trial court's ruling, *id.* at A56-A58. The State did not renew this argument in its certiorari petition and it is therefore not before this Court.

3. The Florida Third District Court of Appeal reversed. Pet. App. A99-A135. That court explained that under this Court's decision in *Illinois* v. *Caballes*, 543 U.S. 405 (2005), "a dog sniff is not a search under the Fourth Amendment" because the sniff "detects only contraband" and "no one has a 'legitimate' privacy interest in contraband." Pet. App. A104-A105. The court also held that "[t]he officer and the dog were lawfully present at [respondent's] front door"; it explained that an officer "may approach a suspect's front door and knock in an attempt to talk to that suspect," and "the fact that [the officers here] approached with the dog does not change this result." *Id.* at A112-A113, A116 (citation and internal quotation marks omitted).

4. The Florida Supreme Court reversed. Pet. App. A1-A59. The court held that the dog sniff "is a substantial government intrusion into the sanctity of the home" that "constitutes a 'search' within the meaning of the Fourth Amendment" and must be justified by "an evidentiary showing" of probable cause. *Id.* at A42, A53-A54. The court recognized that this Court has held, in a variety of contexts, that a dog sniff is not a Fourth Amendment search because it is "unique, in the sense that it is minimally intrusive and is designed to detect only illicit drugs and nothing more." *Id.* at A26. But the court noted that individuals have a heightened privacy expectation in their homes, *id.* at A29-A30, and it decided that the sniff was an "intrusive procedure" because it was "the end result of a sustained and coordinated effort by various law enforcement departments"; involved "multiple police vehicles, multiple law enforcement personnel, * * * and an experienced dog handler and trained drug detection dog"; and "took place in plain view of the general public," *id.* at A39. Having con-

cluded that a dog sniff of a residence is a search, the court then held that probable cause, not reasonable suspicion, is required to justify it. *Id.* at A44-A54.

Justice Lewis concurred on the ground that an individual has a reasonable expectation of privacy in "the air and odors that may be within" a house and "may unintentionally escape" from it. Pet. App. A63.

Justice Polston dissented, explaining that "a dog sniff does not constitute a search within the meaning of the Fourth Amendment because it only reveals contraband and there is no legitimate privacy interest in contraband." Pet. App. A81. The determinative factor, Judge Polston stated, is "the very limited and unique type of intrusion involved in a dog sniff," "not whether the object sniffed is luggage, an automobile, or a home." *Id.* at A93.

SUMMARY OF ARGUMENT

The use of a trained narcotics-detection dog to sniff the front door of a suspected grow house is not a Fourth Amendment search.

A. This Court's decisions establish that a sniff by a trained drug-detection dog is not a "search." The Court has explained on several occasions, beginning with *United States* v. *Place*, 462 U.S. 696, 707 (1983), that a dog sniff is "*sui generis*" because it reveals only the presence of contraband, and not any private lawful activities. In *United States* v. *Jacobsen*, 466 U.S. 109 (1984), the Court further explained that a person lacks a legitimate privacy interest in contraband, and thus an investigatory technique that exposes only contraband, and nothing more, is not a Fourth Amendment search. The Court reiterated this principle in *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), and *Illinois* v.

Caballes, 543 U.S. 405 (2005), where it upheld dog sniffs of vehicles. Taken together, these cases establish that a person lacks a protected privacy interest in contraband, and a dog sniff is not a search because the only thing it reveals is contraband.

B. A dog sniff for contraband narcotics does not become a "search" when it occurs outside the entrance to a home. In that instance, as with luggage or a vehicle, the sniff detects only contraband. A person does not have a right to possess contraband, even in his or her own residence. The Court's rationale in its prior dog-sniff cases therefore applies equally to a residence: because the sniff detects only contraband, it is not a search requiring individualized suspicion.

This Court made just that point in *Caballes*, when it distinguished a dog sniff from the use of a thermal imaging device outside of a home. The "[c]ritical" distinction is that the dog detects only contraband, while the thermal imager may detect lawful activity and reveal intimate details of the home. 543 U.S. at 409-410. A dog sniff is different from a thermal imager for another important reason: dogs' detection abilities have been recognized and used for centuries; they are not new, sense-enhancing devices that threaten a technological invasion of the home.

A dog sniff involves no physical invasion of the home, and thus it is not a search on a common-law trespass theory. So long as the police are in a place where they have a right to be when they use the dog, the dog sniff is permissible.

C. The Florida Supreme Court erred in holding that the dog sniff here was a search. It was undisputed that the police were lawfully at the front door when they used the dog and that the dog was trained only to detect

contraband. The Florida Supreme Court's conclusion that the dog sniff was a search misconstrued this Court's decisions and placed dispositive weight on facts not supported by the record and unrelated to the sniff itself. Moreover, the court's concerns about widespread use of drug-detection dogs are not borne out by experience. The decision of the Florida Supreme Court should be reversed.

ARGUMENT

A DOG SNIFF FOR CONTRABAND NARCOTICS AT THE FRONT DOOR OF A HOUSE IS NOT A FOURTH AMENDMENT "SEARCH"

The Fourth Amendment to the United States Constitution provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Whether an investigatory technique is a "search" of a house within the meaning of the Fourth Amendment depends on two inquiries. First, it depends on whether the technique infringes a legitimate privacy interest. *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984); see *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A person has a legitimate privacy interest if he has a subjective expectation of privacy and society recognizes that expectation as objectively reasonable. *California* v. *Greenwood*, 486 U.S. 35, 39 (1988); *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Second, a "search" occurs when the government obtains information through a "physical intrusion of a constitutionally protected area," in a manner that would constitute a "common-law trespass." *United States* v. *Jones*, 132 S. Ct. 945, 949-951 (2012); *id.* at 955 (Sotomayor, J., concurring).

The dog sniff of respondent's residence was not a "search" under the Fourth Amendment. A person does not have a legitimate interest in possessing contraband, and a sniff by a narcotics-detection dog reveals only contraband, not protected private information. Accordingly, such a sniff is not a search. Moreover, a dog sniff at the front door of a house involves no physical intrusion into a constitutionally protected area, and thus it is not a search on a common-law trespass theory.

The fact that a dog sniff occurs outside a home does not make it a search. The determinative fact is the limited information the sniff reveals—the presence of contraband—and not where it occurs. So long as the police are in a place where they have a right to be, they may use a drug-detection dog to conduct a sniff limited to revealing the presence or absence of narcotics. The Florida Supreme Court's contrary conclusion should be reversed.[2]

A. This Court's Decisions Establish That A Sniff By A Trained Narcotics-Detection Dog Is Not A Fourth Amendment "Search"

This Court has concluded, in several different contexts, that a sniff by a police dog trained to detect only illegal narcotics is not a Fourth Amendment "search." The Court has explained that a sniff by a narcotics-de-

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[2] Some police dogs are trained to detect substances other than contraband narcotics, such as explosives or weapons. See, *e.g.*, Paul B. Jennings, Jr., *Origins and History of Security and Detector Dogs*, *in* Canine Sports Medicine and Surgery 16, 18-19 (Mark S. Bloomberg et al. eds., 1998). This case does not concern the legality of those types of dog sniffs. As several Members of the Court have noted, sniffs by dogs trained to detect explosives or weapons may present different questions than sniffs by drug-detection dogs. See, *e.g.*, *Caballes*, 543 U.S. at 417 n.7 (Souter, J., dissenting); *id.* at 423-424 (Ginsburg, J., dissenting).

tection dog does not infringe protected privacy interests because the dog detects only contraband, and a person has no legitimate interest in possessing contraband.

1. The Court first addressed the legality of a canine sniff for narcotics in *United States* v. *Place*, 462 U.S. 696 (1983). In that case, after a man flying from Miami to New York aroused the suspicion of law enforcement officers, they had a narcotics-detection dog sniff his luggage. *Id.* at 698-699. Based on the dog's positive alert, the police obtained a warrant and found over one kilogram of cocaine in the luggage. *Id.* at 699. The question before the Court was whether it was permissible for the officers to detain the luggage to allow the dog sniff based on their suspicion that the luggage contained narcotics. *Id.* at 697-698. To resolve that question, the Court considered whether the dog's sniff of the luggage was a Fourth Amendment search. *Id.* at 706.

The Court held that the dog sniff "did not constitute a 'search' within the meaning of the Fourth Amendment." *Place*, 462 U.S. at 707. The Court reasoned that a "canine sniff is *sui generis*": it "discloses only the presence or absence of narcotics, a contraband item." *Ibid.* The sniff "does not require opening the luggage," and it "does not expose noncontraband items that otherwise would remain hidden from public view." *Ibid.* Thus, the Court concluded, even though "the sniff tells the authorities something about the contents of the luggage," the information obtained is so limited that it does not infringe a protected privacy interest. *Ibid.*

2. In *United States* v. *Jacobsen*, *supra*, the Court further explained its reasoning in *Place* and reiterated that an investigatory technique that reveals only the presence of contraband is not a Fourth Amendment search. The issue in *Jacobsen* was whether a chemical

field test to determine whether a substance in a package was cocaine was a search. 466 U.S. at 122. The package had been damaged in transit, revealing that it contained a white powder. *Id.* at 111-112. A federal agent performed a brief chemical test on the powder and confirmed that it was cocaine. *Id.* at 112.

The Court held that the chemical test was not a search because it did not infringe a reasonable expectation of privacy. *Jacobsen*, 466 U.S. at 122-124. The test "could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine." *Id.* at 122; see *id.* at 112 & n.1. Because "Congress has decided * * * to treat the interest in 'privately' possessing cocaine as illegitimate," the Court explained, "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* at 123.

The Court observed that *Place* "dictated" its conclusion that the chemical test was not a search. *Jacobsen*, 466 U.S. at 123. The determinative factor in *Place*, the Court noted, was that the canine sniff revealed only the presence of contraband: "[T]he *reason* [the dog sniff in *Place*] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items." *Id.* at 124 n.24. For both the chemical test in *Jacobsen* and the dog sniff in *Place*, the Court found that the likelihood that the technique "will actually compromise any legitimate interest in privacy" was "much too remote to characterize the [technique] as a search subject to the Fourth Amendment." *Id.* at 124.

3. In *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), the Court applied this reasoning to a canine sniff

of a car at a drug-interdiction checkpoint. The question presented was whether police officers may stop a predetermined number of vehicles at a checkpoint, briefly converse with the occupants, and use a narcotics-detection dog to sniff the vehicles. *Id.* at 34-35. To answer that question, the Court considered whether the dog sniff was a search, independent of the seizure of the vehicles. *Id.* at 40.

The Court concluded that "walk[ing] a narcotics-detection dog around the exterior of each car" was not a search. *Edmond*, 531 U.S. at 40. The Court reiterated that the key factor was that the dog would detect only contraband. "Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics." *Ibid.* Accordingly, although the Court concluded that the suspicionless seizures at the checkpoints were invalid, *id.* at 48, it reaffirmed that the police may conduct dog sniffs for illegal narcotics without first establishing probable cause, *id.* at 40. Every Member of the Court agreed with the conclusion that a dog sniff of a vehicle is not a search because it reveals only contraband. *Ibid.*; see *id.* at 52-53 (Rehnquist, C.J., dissenting).

4. The Court most recently reiterated that a sniff by a trained narcotics-detection dog is not a search in *Illinois* v. *Caballes*, 543 U.S. 405 (2005). The *Caballes* Court considered whether the Fourth Amendment permits police to use a narcotics-detection dog to sniff a vehicle during a valid traffic stop. *Id.* at 407. The Court concluded that use of the dog was lawful, relying on *Jacobsen*, *Place*, and *Edmond*. *Id.* at 408-409.

As in those cases, the Court reasoned that "[o]fficial conduct that does not compromise any legitimate inter-

est in privacy is not a search subject to the Fourth Amendment" and that "governmental conduct that *only* reveals the possession of contraband" is conduct that "compromises no legitimate privacy interest." *Caballes*, 543 U.S. at 408 (internal quotation marks omitted). The Court reiterated that "any interest in possessing contraband cannot be deemed 'legitimate,'" *ibid.*; a person's expectation or hope that his illegal drugs "will not come to the attention of the authorities" is not one that "society is prepared to consider reasonable," *id.* at 409 (quoting *Jacobsen*, 466 U.S. at 122). Because the use of a trained narcotics-detection dog at a traffic stop "[i]s '*sui generis*' because it 'discloses only the presence or absence of narcotics, a contraband item,'" the Court concluded, it "does not implicate legitimate privacy interests" and therefore is not a search. *Ibid.* (quoting *Place*, 462 U.S. at 707).

5. This Court's decisions establish two fundamental principles that are applicable here. First, a person does not have a legitimate expectation of privacy in the odor of contraband. In *Jacobsen*, this Court made clear that a person's "mere expectation * * * that certain facts will not come to the attention of the authorities" does not mean he has "an interest in privacy that society is prepared to recognize as reasonable." 466 U.S. at 122. Because certain drugs cannot be possessed legally, governmental conduct that reveals only whether a substance is one of those drugs "compromises no legitimate privacy interest." *Id.* at 123. The Court reaffirmed in *Caballes* that "any interest in possessing contraband cannot be deemed 'legitimate,'" 543 U.S. at 408-409, and

even those Justices who dissented in *Caballes* did not take issue with that settled principle.[3]

Second, a sniff by a trained drug-detection dog is not a "search" because the dog detects only limited information in which a person has no legitimate expectation of privacy—the presence of contraband. In each case addressing dog sniffs, the Court's primary rationale was that because the dog sniff "does not expose noncontraband items," it does not infringe a reasonable privacy expectation. *Place*, 462 U.S. at 707; see *Caballes*, 543 U.S. at 408-410; *Edmond*, 531 U.S. at 40.

The Court has noted other facts that make dog sniffs "much less intrusive than a typical search," *Place*, 462 U.S. at 707—such as their brevity, see *Jacobsen*, 466 U.S. at 125 n.28, and the fact that they do not involve any physical invasion of the item or place under investigation, see *Edmond*, 531 U.S. at 40. But the Court has made clear that the "*reason*" that a dog sniff "d[oes] not intrude upon any legitimate privacy interest [i]s that the governmental conduct could reveal nothing about noncontraband items." *Jacobsen*, 466 U.S. at 124 n.24.

B. A Dog Sniff At The Front Door Of A House Is Not A Fourth Amendment "Search" So Long As The Police Are Lawfully At That Location

A canine sniff for contraband narcotics does not become a Fourth Amendment search when it occurs out-

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[3] See *Caballes*, 543 U.S. at 416 (Souter, J., dissenting) (approving use of the chemical test in *Jacobsen* because it "would either show with certainty that a known substance was contraband or would reveal nothing more" about the powder but distinguishing a dog sniff); *id.* at 421-422 (Ginsburg, J., dissenting) ("Even if the drug sniff is not characterized as a Fourth Amendment 'search,' the sniff surely broadened the scope of the traffic-violation-related seizure." (internal citations omitted)).

side a private home. As with the other contexts the Court has considered, the determinative fact is that the dog sniff reveals only the presence of contraband. The Court made just that point in *Caballes*, when it distinguished the use of a thermal-imaging device from a dog sniff on the ground that the thermal imager could reveal intimate, private details inside the home and a dog sniff could not. Further, a dog sniff cannot be deemed a search on a common-law trespass theory, because it involves no physical invasion of a constitutionally protected area. So long as the police have a right to be at the location of the sniff, which they generally do when they approach the front door of a home, their use of a narcotics-detection dog is not a Fourth Amendment search.

1. A canine sniff for narcotics outside of a house does not infringe the resident's reasonable expectation of privacy. As with luggage or a vehicle, a dog sniff outside of a house is "much less intrusive than a typical search": it does not involve any physical entry into the house, its duration is brief, and "the information obtained is limited." *Place*, 462 U.S. at 707. The sniff is "*sui generis*" in that it "discloses only the presence or absence of narcotics, a contraband item." *Ibid.* It does not disclose whether the house is occupied, what rooms the occupants are in, or what the occupants are cooking for dinner. Cf. *Jacobsen*, 466 U.S. at 122 (chemical test "could tell [law enforcement] nothing more, not even whether the substance was sugar or talcum powder"). Even if the dog smells other odors, the only odor it is trained to communicate to police is that of contraband. "Everything" inside the home "remain[s] undetected except the narcotics, which [the occupant] ha[s] no right to possess in the first place." *United States* v. *Brock*,

417 F.3d 692, 697 (7th Cir. 2005). As this Court explained, "no other investigative procedure * * * is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Place*, 462 U.S. at 707.[4]

The fact that a narcotics-detection dog sniffs a house, as opposed to a package or a vehicle, does not make the sniff a search. A person has no reasonable expectation of privacy in contraband, and the contraband does not become lawful when it is stored inside a residence. *Jacobsen*, 466 U.S. at 123 ("governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest"). In none of its decisions addressing dog sniffs did the Court base its decision on where the contraband was stored; instead, the dispositive factor in each case was the uniquely targeted nature of this investigatory technique. *Caballes*, 543 U.S. at 408-409; *Edmond*, 531 U.S. at 40; *Place*, 462 U.S. at 707. Although several features of dog sniffs limit their intrusiveness, the Court has consistently pointed to the fact that the dog sniffs only detect contraband as the "rationale" for its holdings. *Jacobsen*, 466 U.S. at 124 n.24; see *Caballes*, 543 U.S. at 409; *Edmond*, 531 U.S. at 40; *Place*, 462 U.S. at 707. That rationale is fully applicable

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[4] The possibility that a well-trained narcotics-detection dog may alert in error does not convert a dog sniff of a house into a search. An erroneous alert does not "reveal[] any legitimate private information"; it means only that the dog has communicated wrong information about contraband. *Caballes*, 543 U.S. at 409. Although a false alert does not make the dog sniff a search, it "might affect whether a warrant issued in reliance on the dog sniff was supported by probable cause." *Brock*, 417 F.3d at 696 n.1. The dog's reliability is not at issue in this case. See note 10, *infra*.

to a dog sniff outside of a house. A dog sniff of a house for contraband narcotics therefore "does not rise to the level of a constitutionally cognizable infringement" on privacy interests. *Caballes*, 543 U.S. at 409.

2. The Court focused on the uniquely limited nature of dog sniffs in *Caballes*, when it distinguished such sniffs from the use of a thermal-imaging device. In *Kyllo* v. *United States*, 533 U.S. 27 (2001), the Court held that the use of a thermal-imaging device outside of a house to determine whether marijuana was being grown inside was a Fourth Amendment search requiring individualized suspicion. *Id.* at 29-30, 40. The Court observed that the right to be free of unreasonable government intrusions in a home is "[a]t the very core" of the Fourth Amendment, *id.* at 31 (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)), and it concluded that the use of a thermal imager—"a device that is not in general public use"—to uncover "details of the home that previously have been unknowable without physical intrusion" is a Fourth Amendment search, *id.* at 40.

In *Caballes*, this Court distinguished a dog sniff from use of a thermal-imaging device on the ground that sniffs by drug-detection dogs reveal only contraband, whereas use of a thermal-imaging device could reveal private information about lawful activities. 543 U.S. at 409-410. The Court explained that its rule that a dog sniff is not a search is "entirely consistent" with *Kyllo* because of the "[c]ritical" distinction between the two investigatory techniques: a thermal-imaging device is "capable of detecting lawful activity," such as the "hour each night the lady of the house takes her daily sauna and bath," but a trained canine detects only contraband. *Ibid.* (citation and internal quotation marks omitted).

While the Court noted that the "legitimate expectation that information about perfectly lawful activity will remain private" in *Kyllo* was "categorically distinguishable" from a person's "expectations concerning the nondetection of contraband in the trunk of his car," *id.* at 410, the Court's emphasis was on the limited nature of the information obtained through a dog sniff—not on the location of the sniff.

In addition to the critical distinction noted in *Caballes*, a canine sniff is unlike the use of a thermal-imaging device in other important ways. The *Kyllo* Court focused on the fact that the thermal imager was a "sense-enhancing technology * * * not in general public use" and it expressed concern that citizens would be "at the mercy of advancing technology" if its use was allowed. 533 U.S. at 34-35; see *id.* at 40. Narcotics-detection dogs are not a new "technology," and the use of a dog to detect a particular scent is not a modern development. Dogs have long been recognized for their acute sense of smell. See, *e.g.*, *United States* v. *Broadway*, 580 F. Supp. 2d 1179, 1191 (D. Colo. 2008) (providing examples dating back to 800 B.C.); *Hodge* v. *State*, 13 So. 385, 385 (Ala. 1893) ("It is common knowledge that dogs may be trained to follow the tracks of a human being with considerable certainty and accuracy."). Before the Founding, dogs were routinely used to track thieves and murderers in England.[5] Dogs have been used by

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[5] See, *e.g.*, Samuel G. Chapman, *Police Dogs in North America* 4 (1990) ("English soldiers used tracking hounds in the 1620s to follow the trail of highwaymen who fled justice in unsettled parts of the United Kingdom."); Estelle Ross, *The Book of Noble Dogs* 40 (1922) (noting use of bloodhounds to track Robert the Bruce after he murdered John Comyn during the First War of Scottish Independence); 1 Edward Topsell, *The History of Four-Footed Beasts and Serpents and Insects*

law enforcement in the United States since at least the early 1900s,[6] and by the 1970s, federal agents had begun using narcotics-detection dogs to interdict illegal drugs.[7] Use of a police dog to detect contraband, then, does not raise the concerns about rapidly advancing technology that were present in *Kyllo*.

3. A sniff by a drug-detection dog does not physically invade a constitutionally protected area and therefore does not qualify as a "search" under the Court's "property-based" approach to the Fourth Amendment. *Jones*, 132 S. Ct. at 949-950, 951-953 & n.8. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States Dist. Court*, 407 U.S. 297, 313 (1972). This Court has recognized that one way dog sniffs are limited is that they do not require entry into the item or place under investigation. See *Place*, 462 U.S. at 707; *Edmond*, 531 U.S. at 40; *Caballes*, 543 U.S. at 409; see also *Jacobsen*, 466 U.S. at 124 n.24 (dog sniff in *Place* "involved no physical invasion of Place's effects"). And unlike the field test at issue in *Jacobsen*, a dog sniff does not even minimally intrude on the

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118, 131 (1658) (reprinted 1967) (describing bloodhounds' unique ability to track thieves); J.G. Wood, *The Illustrated Natural History* 278 (1865) (explaining how "[s]heep-stealers * * * were frequently detected by the delicate nose of the Bloodhound").

[6] See Chapman 15-26 (citing a 1904 Philadelphia police program to use St. Bernards to discover unconscious victims, detect the smell of fire, and find lost children; a 1907 New Jersey patrol dog program; and twelve other similar programs in the early twentieth century); *Blair* v. *Commonwealth*, 204 S.W. 67, 68 (Ky. Ct. App. 1918) (noting use of bloodhounds to track perpetrator of a "housebreaking").

[7] See Mark Derr, *A Dog's History of America* 345 (2004); Jennings 18.

owner's possessory interests in property. See *Jacobsen*, 466 U.S. at 124-125.

Because a narcotics-detection dog does not physically invade a package, vehicle, or house, but simply sniffs the air around that item or place, it does not constitute a common-law trespass. The Court recognized as much in *Kyllo*, when it observed that visual observation of a home would not qualify as a common-law trespass, 533 U.S. at 31-32, and went on to analyze thermal imaging from outside the home under a principle that did not invoke notions of trespass, *id.* at 34. See *Jones*, 132 S. Ct. at 949-950; see also, *e.g.*, 3 William Blackstone, *Commentaries* 209 (1768). And this understanding is consistent with the Court's long recognition that the Constitution does not prohibit officers from smelling the air in areas where they are lawfully in place. See, *e.g.*, *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948) (smell of opium coming from room); *Taylor* v. *United States*, 286 U.S. 1, 6 (1932) (whisky smell coming from garage). Accordingly, although dogs have been recognized for their detection capabilities for centuries, see pp. 18-19, *supra*, nothing suggests that a mere sniff would have been treated as a trespass at the time of the Founding.

4. A canine sniff for narcotics is consistent with the Fourth Amendment's strong protection of privacy in a home. This Court long has recognized that the Fourth Amendment embodies a particular "respect for the sanctity of the home." *Payton* v. *New York*, 445 U.S. 573, 601 (1980). For that reason, the Court has held that, with limited exceptions, the police generally may not enter a home to collect evidence or arrest a suspect without a warrant supported by probable cause. See *id.* at 602-603 (arrest); *Mapp* v. *Ohio*, 367 U.S. 643, 654-655 (1961) (search); but see *Kentucky* v. *King*, 131 S. Ct.

1849, 1856 (2011) (imminent destruction of evidence); *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (emergency aid exception); *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976) (hot pursuit); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973) (consent).

A dog sniff does not itself require entry into a home, and a positive alert does not mean the police may automatically enter the home. Rather, the ordinary rule is that police must have a warrant to enter. See *Payton*, 445 U.S. at 590. The warrant is required because even though a person lacks a reasonable expectation of privacy in contraband, he retains a legitimate privacy expectation in the "intimate details of [his] home" (*Kyllo*, 533 U.S. at 36), and the police may not interfere with that legitimate privacy expectation absent a warrant or a justification sufficient to excuse the warrant requirement.

The warrant requirement ensures a significant level of protection for the occupant of a home, because it precludes police entry unless a detached and neutral magistrate has examined the facts presented (including the dog's alert) and has found that there is probable cause to search all areas proposed by the police. See, *e.g.*, *Katz*, 389 U.S. at 356-357 (requirements that police "present their estimate of probable cause for detached scrutiny by a neutral magistrate" and "observe precise limits established in advance by [the] court order" are important Fourth Amendment "safeguards"). In that respect, a canine sniff outside of a house is different from a canine sniff of a vehicle, because although the police may search a vehicle or its containers once they have a reasonable belief that contraband is within, see, *e.g.*, *California* v. *Acevedo*, 500 U.S. 565, 569-573 (1991), they generally may not immediately search a house

based on that same belief. Although an alert by a narcotics-detection dog may lead to the search of a residence, then, that search itself must comply with the requirements of the Fourth Amendment.

5. This analysis assumes that law enforcement officers have not violated the Fourth Amendment by arriving at the location from which they use a narcotics-detection dog outside of a home. Just as a police officer may seize evidence in plain view or may seek consent to a search only when the officer is lawfully at that location, see, *e.g.*, *King*, 131 S. Ct. at 1858, so too the police only may use a narcotics-detection dog in places where they are lawfully present, see *Jacobsen*, 466 U.S. at 119-121. If the police committed a constitutionally proscribed trespass or otherwise invaded a protected privacy interest before the dog sniff, even though the dog sniff is not a search, the police action would not be valid.

It is well-settled that law enforcement officers may approach the front door of a home, knock, and attempt to obtain voluntary cooperation from the occupants. See *King*, 131 S. Ct. at 1862; *United States* v. *Gould*, 364 F.3d 578, 590 (5th Cir.) ("a 'knock and talk' police investigatory practice has clearly been recognized as legitimate"), cert. denied, 543 U.S. 955 (2004); 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(c), at 574-577 (4th ed. 2004). When the police approach the front door of a home, they are "do[ing] no more than any private citizen might do." *King*, 131 S. Ct. at 1862; see, *e.g.*, *Estate of Smith* v. *Marasco*, 318 F.3d 497, 519 (3d Cir. 2003); *Ellison* v. *United States*, 206 F.2d 476, 478 (D.C. Cir. 1953); *Quintana* v. *Commonwealth*, 276 S.W.3d 753, 758 (Ky. 2008).

To reach the front door, the police may use a route customarily open to visitors. "[N]o Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways." *United States* v. *Reed*, 733 F.2d 492, 501 (8th Cir. 1984). That is true for two reasons. First, use of driveways and walkways to reach the front door does not infringe the occupant's reasonable expectation of privacy because those areas are visible to the public and open to visitors. See, *e.g.*, *United States* v. *Wells*, 648 F.3d 671, 679 (6th Cir. 2011); *Lorenzana* v. *Superior Court*, 511 P.2d 33, 35 (Cal. 1973); see also *Santana*, 427 U.S. at 42 (person standing at the front door of her house "was not in an area where she had any expectation of privacy").

Second, such an entry onto private property is not a trespass because of the longstanding custom of implied consent to such visitors. See *United States* v. *Lakoskey*, 462 F.3d 965, 973 (8th Cir. 2006) ("The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to contact the occupants for a lawful request." (citation and internal quotation marks omitted)), cert. denied, 549 U.S. 1259 (2007); see also, *e.g.*, Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* § 823 (1889); Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 303 (1880).[8]

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[8] This view is consistent with the Court's explanation that the Fourth Amendment protects not only a home but the curtilage surrounding a home, and "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *United States* v.

These principles apply to police officers just as they apply to "mail carriers, sanitation workers, neighbors, and Girl Scouts." *Wells*, 648 F.3d at 679. The analysis may be different if the police entered an area of the property that is not typically open to visitors, or the occupant took steps to bar all visitors from the property. But in the ordinary case, the police may approach the front door of a home, and when they do, they may bring a police dog with them because the dog's sniffing is not a search.

C. The Florida Supreme Court Erred In Concluding That The Dog Sniff In This Case Was A Search

The Florida Supreme Court erred in suppressing all of the evidence obtained from the warrant search of respondent's residence. The dog sniff here occurred in a place where the police were lawfully present; the sniff itself was not a search; nothing about the circumstances surrounding the sniff made it a search; and the Florida Supreme Court's concerns about the widespread use of drug-sniffing dogs lack foundation.[9]

Dunn, 480 U.S. 294, 300 (1987). Although the assessment of the extent of the curtilage is a fact-specific inquiry, the area outside a front door, and a walkway or driveway leading to the front door, may be considered outside the curtilage. See *Wells*, 648 F.3d at 675 & n.4; *United States* v. *Brown*, 510 F.3d 57, 65 (1st Cir. 2007); *Lakoskey*, 462 F.3d at 973; *United States* v. *French*, 291 F.3d 945, 954-955 (7th Cir. 2002). Whether these areas are treated as curtilage or not, the relevant point is that they are customarily open to visitors and therefore may be used by the police as well.

[9] The Florida Supreme Court also held that, assuming a dog sniff is a search, probable cause is the level of individualized suspicion required. See Pet. App. A44-A54. The State did not seek review of that holding in its certiorari petition, and it is therefore not at issue here.

1. The brief sniff by a drug-detection dog at respondent's front door was not a Fourth Amendment search. It was undisputed here that the two police officers and the dog were lawfully in place when the sniff occurred. Pet. App. A31; *id.* at A75 (Polston, J., dissenting). The officers and the police dog approached the front door of respondent's residence using the typical route from the street, through the driveway and up the walkway to the front door. See J.A. 94. This area was visible from the street, see J.A. 49-50, and no evidence indicated that respondent had taken any measures to restrict access to the front door. The courts below agreed that "the officer[s] had every right to walk to [respondent's] front door." Pet. App. A112; see *id.* at A31 (citing *State* v. *Morsman*, 394 So. 2d 408, 409 (Fla. 1981) ("Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch.")).

Once the officers were present at respondent's front door, it was permissible for them to allow the police dog to sniff the area. The police dog here had been trained to alert only to the presence of certain illegal drugs. J.A. 54.[10] Because the dog was trained to reveal only the presence of contraband and not any other information about happenings inside of the house, and because the dog did not enter the house, its use was not a Fourth Amendment search. After the dog alerted, the police then proceeded in a reasonable way, with one officer obtaining a search warrant while others secured the scene. J.A. 44-56; Pet. App. A38.

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[10] This Court granted certiorari in *Florida* v. *Harris*, No. 11-817 (cert. granted Mar. 26, 2012), to consider whether an alert by a well-trained narcotics-detection dog is sufficient to establish probable cause for a search of a vehicle. Neither respondent nor any of the courts below has questioned the dog's training or reliability in this case.

2. The Florida Supreme Court cited several factors in support of its conclusion that the dog sniff here was a search. First, that court reasoned that a person's reasonable expectation of privacy is greatest in his home. Pet. App. A29-A31. That is true, but it does not answer the question here. "[T]he Fourth Amendment protects people, not places," *Katz*, 389 U.S. at 351; the relevant question is not whether a person has a reasonable expectation of privacy in his home generally, but whether he has a reasonable expectation as against an investigatory technique that detects only contraband. As this Court has explained, because a dog search "does not expose noncontraband items that otherwise would remain hidden from public view," it "does not rise to the level of" a Fourth Amendment search. *Caballes*, 543 U.S. at 409 (citation and internal quotation marks omitted).

The Florida Supreme Court found this reasoning "inapplicable" to dog sniffs outside of homes because this Court's dog-sniff decisions only involved luggage and vehicles. Pet. App. A26-A27. But this Court did not "limit its reasoning regarding dog[] sniffs to locations or objects unrelated to the home." *Id.* at A93 (Polston, J., dissenting); see pp. 15-18, *supra*. To the extent the Florida Supreme Court relied on *Kyllo*, that reliance was misplaced, because this Court has distinguished use of a thermal-imaging device from a dog sniff on the ground that the former "was capable of detecting lawful activity" ("intimate details in a home") and the latter could only detect "contraband." *Caballes*, 543 U.S. at 409-410.

The Florida Supreme Court also characterized the dog sniff as "an intrusive procedure." Pet. App. A39, A41. But the drug-detection dog here was trained only

to detect six types of illegal drugs, J.A. 54, and for that reason, the sniff was no more intrusive on legitimate privacy interests than those at issue in *Place*, *Edmond*, and *Caballes*. The Florida Supreme Court attempted to distinguish this case on the ground that a dog sniff of a home "does not *only* reveal the presence of contraband." Pet. App. A41. But the court did not find that the dog detected any substance other than contraband narcotics.

3. The Florida Supreme Court based its decision in part on its belief that a dog sniff of a residence involves a "public spectacle" that "will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident." Pet. App. A39-A40. The court noted that the dog sniff was "the end result of a sustained and coordinated effort by various law enforcement departments," that it "involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers." *Id.* at A39.[11]

These factors identified by the Florida Supreme Court, even if they were fully supported by the record,[12]

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[11] The State sought certiorari on the separate question whether the officers' conduct during the investigation was itself a search, Pet. i, and this Court did not grant review on that question. Because the Florida Supreme Court appeared to base its holding that the dog sniff was a search in part on its view of the officers' conduct, we address that factor briefly here.

[12] There is good reason to doubt these factual conclusions. See Pet. App. A94-A95 (Polston, J., dissenting). The trial court did not make factual findings on the number of officers present on the scene, the effect the dog sniff had on respondent, or whether there was any type of "public spectacle." See *id.* at A136-A138. The evidence at the suppression hearing established only that two officers and the dog approached the front door and that, after the dog alerted, the dog's handler and the dog left and the other officer went to seek a search warrant.

would not transform the dog sniff here into a search. Whether the dog sniff was preceded by a "sustained and coordinated" investigation (see Pet. App. A3, A39) does not change the nature of the sniff. Nor is it significant whether multiple officers were present in the area of respondent's residence, or whether neighbors might have seen the officers and the dog arrive. Although police may violate the Fourth Amendment by conducting a search in an unreasonable manner, see, *e.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 610-612 (1999), that is a different question from whether a Fourth Amendment search occurred in the first place. The dog sniff here was no different in its execution from those in *Place*, *Edmond*, and *Caballes*; all of those dog sniffs involved law enforcement activity by multiple officers. See Pet. App. A94 (Polston, J., dissenting). Indeed, this Court has long recognized that dog sniffs are "much less intrusive" in their manner than typical searches, because they are brief in duration, do not require physical entry, and reveal only limited information. *Place*, 462 U.S. at 707 (finding "no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure").

Finally, the Florida Supreme Court incorrectly focused on events that transpired after the dog sniff, Pet. App. A39, both because those events did not change the nature of the sniff, and because none of those events

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J.A. 77-78, 83, 94-95. Other evidence not introduced at the suppression hearing showed that the two officers were accompanied by DEA agents and three other local police officers and that some of those officers remained on the scene when the lead officer left to obtain a search warrant. Dep. of Detective Pedraja 6-7, 20 (May 30, 2007) (F06-040839 Docket entry No. 70, 11th Judicial Cir., Miami-Dade County).

violated any constitutional protection. It was preferable that the police seek a search warrant rather than immediately attempt to enter the home, see, *e.g.*, *Payton*, 445 U.S. at 602-603, and it is permissible for officers to secure the premises to maintain the status quo while obtaining a warrant, see, *e.g.*, *Segura* v. *United States*, 468 U.S. 796, 798 (1984).

4. The Florida Supreme Court's suggestion that canine sniffs are uniquely "susceptible to being employed in a discriminatory manner" (Pet. App. A29, A41-A42) lacks foundation. The court provided no reason to believe that police would conduct arbitrary or discriminatory dog sniffs of residences as opposed to vehicles and luggage, and there are independent constitutional protections against such practices. See U.S. Const. Amend. V, XIV (equal protection). Further, experience does not suggest that police will conduct widespread, suspicionless dog sniffs in residential neighborhoods. That concern was first raised by the dissenting Justices in *Jacobsen*, see 466 U.S. at 138 (Brennan, J., dissenting), and was repeated by the dissenters in *Caballes*, see 543 U.S. at 422 (Ginsburg, J., dissenting); *id.* at 417 (Souter, J., dissenting). Yet in the nearly three decades since *Jacobsen*, those fears have not materialized.

The rule that a dog sniff outside of a home is not a search has been accepted by all but one of the federal court of appeals that has considered the issue,[13] and yet

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[13] See *United States* v. *Scott*, 610 F.3d 1009, 1015-1016 (8th Cir. 2010) (front door of apartment), cert. denied, 131 S. Ct. 964 (2011); *Brock*, 417 F.3d at 694-697 (locked bedroom door in a shared residence); *Reed*, 141 F.3d at 649-650 (inside home, when police were lawfully in place); *United States* v. *Roby*, 122 F.3d 1120, 1124-1125 (8th Cir. 1997) (front door of hotel room); *United States* v. *Colyer*, 878 F.2d 469, 472-477 (D.C. Cir. 1989) (outside train sleeper compartment); cf. *United States*

no evidence indicates police abuse of the technique. And use of this technique is subject to the "ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *Illinois* v. *Lidster*, 540 U.S. 419, 426 (2004)). Accordingly, this Court should reaffirm that the use of a narcotics-detection dog, whether outside a vehicle, a package, or a home, does not infringe legitimate privacy expectations and therefore does not constitute a Fourth Amendment search.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
WILLIAM C. BROWN
Attorney

MAY 2012

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v. *Lingenfelter*, 997 F.2d 632, 637-639 (9th Cir. 1993) (outside warehouse); but see *United States* v. *Thomas*, 757 F.2d 1359, 1366-1367 (2d Cir. 1985) (outside apartment), cert. denied, 474 U.S. 819 (1985), and 479 U.S. 818 (1986).

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA,

PETITIONER,

v.

JOELIS JARDINES,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE SUPPORTING RESPONDENT

JAMES W. HARPER
Counsel of Record
ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
jharper@cato.org

Counsel for Amicus Curiae

Library of Congress
Law Library

QUESTION PRESENTED

Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because the protections of the Fourth Amendment are part of the bulwark for liberty that the Framers set out in the Constitution and Bill of Rights.

SUMMARY OF ARGUMENT

This case offers the Court an opportunity to place the Fourth Amendment on solid jurisprudential footings. Current Fourth Amendment doctrine has failed to produce rules that are administrable and that protect privacy over time. In particular, this Court's use of proxies such as having a "reasonable expectation of privacy" to locate Fourth Amendment interests has failed to produce a workable rule, and it has eroded privacy. The *Caballes* Court used a corollary from

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

"reasonable expectations" analysis that threatens to erode privacy protections even further.

Reasoning backward from "expectations" requires courts to engage in impossible surmise about privacy, neglecting the Fourth Amendment's protection of a constitutional right. This Court should return to plain meanings of Fourth Amendment terms such as "search," and to precedents that spring from the Fourth Amendment's terms.

A "search" occurs when government agents seek out that which is otherwise concealed from view, the opposite condition from what pertains when something is in "plain view." People maintain "privacy" by keeping things out of others' view, exercising control over personal information using physics and law. This Court's cases give Fourth Amendment backing to physical and legal arrangements that control information appurtenant to persons, houses, papers, and effects. The Court in this case should make that explicit while finding that government agents' use of a drug dog to sniff at Joelis Jardines's front door was a Fourth Amendment search that required probable cause and a warrant.

ARGUMENT

I. CURRENT FOURTH AMENDMENT DOCTRINE HAS FAILED TO PRODUCE ADMINISTRABLE RULES THAT PROTECT PRIVACY CONSISTENTLY OVER TIME

When he tried to synthesize this Court's Fourth Amendment cases in his concurrence to *Katz v. United States*, 389 U.S. 347 (1967), Justice Harlan set search and seizure jurisprudence on a course that

still sorely challenges this Court, lower courts, law enforcement, and privacy-loving American citizens. "Reasonable expectation" doctrine is a jumble of puzzles not up to the task of administering the Fourth Amendment, though the amendment was meant to be a principal source of protection for Americans' privacy from government.

A. This Court's use of proxies to locate Fourth Amendment interests has failed to produce a workable rule, and it has eroded the Fourth Amendment's protections for privacy.

To survey Fourth Amendment history ever-so-briefly, during our nation's low-tech and relatively sedentary early period, presence in and around the home was a strong proxy for having the security from government intrusion that the Fourth Amendment protects. "Houses" are specifically named in the Fourth Amendment because they have traditionally been the locus of activity and communications the Framers meant to protect from government access and scrutiny. *Boyd v. United States*, 116 U.S. 616, 624-627 (1886) (recounting history related to Fourth Amendment and "unreasonable searches and seizures"). This Court has been particularly solicitous of the home, of course. *See, e.g.*, *Gouled v. United States*, 255 U.S. 298, 305-06 (1921), *Agnello v. United States*, 269 U. S. 20, 32 (1925) (calling the search of a private dwelling without a warrant . . . "unreasonable and abhorrent to our laws.").

Presence in or absence from one's house says little about Fourth Amendment protections for "papers and effects," of course. The Framers had used written

communications both public and private to revolutionize political life on the American continent, so providing for control of information as against government was a priority at the founding. Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 Stan. L. Rev. 553, 564 (2007). Congress's first comprehensive postal statute wrote the confidentiality of sealed correspondence into law with heavy fines for opening or delaying mail. *Id.*at 566-57; Act of Feb. 20, 1792, § 16, 1 Stat. 232, 236. This Court validated Fourth Amendment protection for mail in *Ex Parte Jackson*, 96 U.S. 727 (1877).

Advances in mobility and information technology have weakened the proxy that presence in the home served for having Fourth Amendment interests, and courts have struggled to recognize communications in forms other than paper as "effects." So Fourth Amendment protections for communications once borne exclusively on paper have diminished while the quantity of communication and the extent of personal information it contains has increased.

In the year this Court decided *Ex Parte Jackson*, both Western Union and the Bell Company began establishing voice telephone services. Gerald W. Brock, *The Second Information Revolution* 28 (Harvard University Press, 2003). Now, instead of written messages in the post, representations of the human voice itself began moving across distance, at light speed, in a way few people understood. This is the technology this Court confronted in *Olmstead v. United States*, 277 U.S. 438 (1928).

The Court handled this technological development poorly. Chief Justice William Taft fixed woodenly on

the material things listed in the Fourth Amendment's search and seizure clause. Wiretapping had not affected any of the defendants' tangible possessions, he found, so it had not affected their Fourth Amendment rights. *Olmstead*, 277 U.S. at 464. In dissent Justice Butler noted how "contracts between telephone companies and users contemplate the private use" of telephone facilities. "The communications belong to the parties between whom they pass," he said. *Olmstead*, 277 U.S. at 487 (Butler, J., dissenting). *Cf. Ex Parte Jackson*, 96 U.S. 727 (1877) ("Letters and sealed packages ... are as fully guarded from examination and inspection ... as if they were retained by the parties forwarding them in their own domiciles.").

When the Court applied its corrective thirty-nine-and-a-half years later, it found Fourth Amendment protection for a conversation that would at an earlier time been held in the home, office, or other secluded environment. *Katz*, 389 U.S. at 352. To replicate that seclusion, Charles Katz had shielded the sound of his voice from others, even though in a public place. *Katz*, 389 U.S. at 352.

Since then, courts might have been examining how parallels to the walls of the home and the phone booth in *Katz* conceal information to maintain that "intimate relation" to the person that characterizes personal effects. *Black's Law Dictionary* 1143 (6th ed. 1990) (defining "personal effects").[2] The physical and

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[2] This Court is familiar, of course, with the treatment of information and expression as a form of property when such things fall within the ambit of federal statutory laws protecting copyright, patent, and trade secret. Less so when self-help causes information and expression to remain within the control of an individual, dyad, family, or other limited group. Developments in technology and society suggest that, in some future case, this

legal barriers people place around information can generally answer whether people have held it close, showing at the same time when the threshold of personal security the Fourth Amendment protects has been crossed.

But Justice Harlan's solo concurrence slipped in a new proxy for Fourth Amendment interests: having "expectations" about "privacy" that society regards as valid. This proxy has caused this Court, lower courts, law enforcement, and citizens to contend with sweeping judgments about privacy and social consensus that they are ill-equipped to make. Courts have regularly purported to apply the "reasonable expectation of privacy" test Justice Harlan debuted in *Katz*, but they have almost never applied it faithfully.

B. The *Caballes* Court, using a corollary from "reasonable expectations" analysis, produced a rule that threatens to erode privacy protections even further.

A precedent in this case neatly illustrates how this Court has neglected to apply *Katz* analysis faithfully to Justice Harlan's formulation, and it also illustrates the illogic of the "reasonable expectation of privacy" test itself. That test, as Justice Harlan intro-

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Court may address to what extent intellectual assets constitute personalty and thus electronic or digital effects subject to Fourth Amendment protection. Movable property—things we easily think of as Fourth Amendment "effects" today—was "not esteemed of so high a nature, nor paid so much regard to by the law" in feudal times prior to the development of trade and commerce. But "we have learned to conceive different ideas of it," wrote Blackstone. 2 W. Blackstone, Commentaries *16, *384-*385. These issues are not before the Court in this case.

duced it in *Katz*, is "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J. concurring).

In *Illinois v. Caballes*, 543 U.S. 405 (2005), this Court did not apply *Katz* analysis. It did not examine (or even assume) whether Roy Caballes had exhibited a subjective expectation of privacy, the first step in the *Katz* test. Thus, the Court could not take the second step, examining its objective reasonableness.

Instead, the *Caballes* Court skipped forward to a corollary of the *Katz* test that the Court had drawn in *United States v. Jacobsen*, 466 U.S. 109 (1984): "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Caballes*, 543 U.S. at 408 (quoting *Jacobsen*, 466 U.S. at 123).

This is a logical extension of the *Katz* test, and one that helps reveal its weakness in maintaining the Fourth Amendment's protections consistently over time. Now, instead of examining whether searches and seizures are reasonable, courts applying the *Jacobsen/Caballes* corollary can uphold any activity of government agents sufficiently tailored to discovering only crime. The right kind of government examination given to persons, houses, papers, and effects is "not a search," *id.*, however intimate it is, no matter how often it recurs, and irrespective of any context or circumstances.

The application of the *Jacobson/Caballes* corollary to present and future technology is fascinating and concerning. In the present case, this Court confronts whether government agents could walk a drug-

sniffing dog to the front door of every home in America, or similarly patrol lines at movie theaters, shopping mall entrances, and such without implicating the Fourth Amendment. Government agents' efforts are not likely to stop with *canis lupus familiaris*. A rule permitting "examinations" of this type would guide their efforts.

The U.S. Dept. of Homeland Security is working on a number of technologies that government agents could deploy in ways that nest with the *Jacobsen/Caballes* corollary but that expose objects of Fourth Amendment protection to intimate scrutiny. For example, the DHS has developed and conducted initial validation of what it calls "Future Attribute Screening Technology" (or FAST), which monitors specific biologic cues to detect intent to cause harm. Testimony of Acting Under Secretary Bradley I. Buswell, Science & Tech. Directorate, before the House Comm. on Approps., Subcomm. on Homeland Security, "Science and Technology Research and Transitioning Products Into Use," Mar.26, 2009, available at http://tinyurl.com/CatoJardines4. Using "video images, audio recordings, cardiovascular signals, pheromones, electrodermal activity, and respiratory measurements," the FAST program would gather the "physiological cues, nonverbal behavioral cues, and paralinguistic (vocally produced sounds, not specific language or words) cues" that indicate wrongful intent. Privacy Impact Assessment for the Future Attribute Screening Technology (FAST) Project, Dec. 15, 2008, at 3, available at http://tinyurl.com/Cato Jardines1. The DHS believes that remote, automated examination of a person's heart rate, eye movements, perspiration, odors, and other bodily characteristics can reveal criminality. This would invade no privacy

interest under the *Jacobsen/Caballes* corollary because the FAST system—though examining all persons in the area where it is deployed—would indicate only on the guilty.

A DHS program that might be directed not only at persons, but also at their houses and effects, is called the "Remote Vapor Inspection System" (or RVIS). RVIS "generates laser beams at various frequencies" to be aimed at a "target vapor." Beams "reflected and scattered back to the sensor head" reveal "spectral 'signatures'" that can be compared with the signatures of sought-after gasses and particulates. Modification to the Statement of Work for the Development of the Remote Vapor Inspection System to Detect Chemical, Biological and High Explosive Threats, Directorate of Science & Technology, U.S. Dept. of Homeland Security, Dir. of Innovation (Dec. 17, 2009) at 5, available at http://tinyurl.com/CatoJardines2; *see* Gregory Mogilevsky et al., *Raman Spectroscopy for Homeland Security Applications*, Int'l J. of Spectroscopy, Vol. 2012 (2012), available at http://tinyurl.com/CatoJardines3. Using RVIS, government agents might remotely examine the molecular content of the air in houses and cars, quietly and routinely explore the gasses exiting houses through chimneys and air ducts, and perhaps even silently inspect any person's exhaled breath. If RVIS technology is programmed to indicate only on substances that indicate wrongdoing, the *Jacobsen/Caballes* corollary extinguishes the idea that its pervasive, frequent, and secret use would be a search.

The DHS Science and Technology Directorate's Commercialization Office exists to "identify, evaluate and commercialize technology for the specific goal of

rapidly developing and deploying products and services" for use by its "customers" throughout government. Testimony of Acting Under Secretary Buswell, *supra*. In the coming thirty-nine and a half years, these and other technologies could see mass deployment across government and law enforcement if this Court maintains or strengthens the *Jacobsen/Caballes* corollary. Technology is historically contingent. Given other, similar technologies on the horizon, it is not reliable over time to say that any technology, including a drug-sniffing dog, is "*sui generis*," *See United States v. Place*, 462 U.S. 696, 707 (1983).[3]

It is no answer to the constitutional weakness of the *Jacobsen/Caballes* corollary to deny as "ludicrous" a future in which "police officers will be wondering [sic] the myriad of residential streets in the United States in order to locate front doors with narcotics odor." Br. of *Amici Curiae* National Police Canine Association and Police K-9 Magazine at 29. The legal question whether such activity would be Fourth Amendment searching does not turn on predictions that it would not come to pass. When *amici* supporting law enforcement officers deny that this will happen, it confesses their sense that it would be wrong.

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[3] The *Place* Court reached the constitutionality of dog-detection even though Place did not contest the issue, 498 F. Supp. 1217, 1228 (E.D.N.Y. 1980), and it was not briefed at the Supreme Court. *United States v. Place*, 462 U.S. 696, 723-34 (Blackmun, J., concurring in the judgment).

C. Reasoning backward from "expectations" requires courts to engage in impossible surmise about privacy, neglecting the Fourth Amendment's protection of a constitutional right.

It is reasonable to expect that one's privacy will be maintained when one has placed sufficient physical and legal barriers around personal information. But the "reasonable expectation of privacy" test does not examine whether physical and legal protections for information were in place. It starts with the beliefs that might flow from information husbandry and works backward to determine whether the Fourth Amendment protects given privacy-protective arrangements.

Prompted to guess at society's privacy values by "reasonable expectations" analysis, courts regularly mistreat the topic. When this Court in *Caballes*, for example, said that "the use of a well-trained narcotics-detection dog . . . generally does not implicate legitimate privacy interests," 543 U.S. at 409, it treated as established by law what should be adjudged on the facts in each case. The court below in this case did a creditable job of analyzing several dimensions of "privacy" that were negatively affected when government agents walked a drug-sniffing dog to the front door of a private home. *See Jardines v. State*, 73 So. 3d 34, 45-51 (Fla. 2011). If courts are to apply *Katz* analysis, reasoning backward from privacy expectations to constitutional protection, this Court should not set presumptions in the doctrine that bias their analyses of privacy expectations relative to the use of detection technologies.

It is wrong to presume in analyzing privacy consequences that the use of a drug-sniffing dog always produces a correct result. Any detection technology has error rates, or "false positives." This is even true, though far more rarely, of chemical tests, such as the one at issue in *Jacobsen*, 466 U.S. at 112 fn. 1. A case recently filed in Nevada reminds us of the possibility that rogue officials may illicitly train dogs to "falsely detect the presence of drugs on cues from handlers." Ed Vogel, *Officers File Suit Alleging Wrongdoing in Police Dog Training Program*, Las Vegas Review Journal, Jun. 26, 2012, available at http://tinyurl.com/CatoJardines11.

The *Caballes* Court's implicit presumption about the accuracy of "well-trained" drug-sniffing dogs is a notable element of its reasoning. A drug-sniffing dog's positive signal is evidence of the presence of narcotics, of course. But the quality of such evidence should be subject to examination and impeachment. Careful consideration of these issues is commended in *Florida v. Harris*, No. 11-817, because when a drug-sniffing dog or any other detection technique does produce a false positive, the privacy consequences are substantial. The use of the detection technique rains costs on the victim in the form of unwarranted detention, arrest, further searching, public embarrassment, opprobrium, and more.

But there are deeper purposes—beyond "privacy"—that the right against unreasonable searches and seizures serves. Justice Louis Brandeis, a founder of privacy as a legal value, *see* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), spoke of a "right to be let alone." *Olmstead*, 277 U.S. at 478. The broad ambiguity of

such language is telling. (It is not an invitation to sloppy reasoning around privacy.) Courts owe Americans the protections of the Fourth Amendment not only because of its functional value in protecting "privacy," but because freedom from unreasonable searches and seizures is a right.

One is not "let alone" when government agents tap one's telephone lines without a warrant. *Id.* One is not "let alone" when government agents bug one's telephone booth without a warrant. *Katz*, 389 U.S. at 348. One is not "let alone" when, in addition to prosecution of an ordinary traffic stop and in the absence of suspicion, one suffers the further ignominy of having one's vehicle, a constitutional effect, *United States v. Jones*, 132 S. Ct. 945, 949 (2012); *United States v. Chadwick*, 433 U.S. 1, 12 (1977), sniffed by a dog. *Cf. Caballes*, 543 U.S. at 406. One is not "let alone" when government agents lacking requisite suspicion come to the front door of one's private residence to scan it for drugs.

The Fourth Amendment is not just a privacy management tool. It is not there simply to keep average Americans well-tended, like garden plants susceptible to over-watering through excess surveillance. The Fourth Amendment describes the right of individuals, retaining sovereignty not given to the state, to be free of unreasonable searches and seizures no matter what material or social consequences a wrongful search might have.

When it originated the *Jacobsen/Caballes* corollary, the *Jacobsen* Court treated privacy as an individual "interest," 466 U.S. at 122, which could be balanced against the government's interest in crime control to determine whether or not there had been a

search. This follows Justice Harlan's reasoning in *Katz*, but it is reasoning that misplaces where the judging is to be done in Fourth Amendment cases. Rather than using "reasonable expectations" analysis, this Court should determine factually and legally whether there has been a search, applying its judgment in determining whether or not any given search was reasonable.

II. THIS COURT SHOULD RETURN TO THE PLAIN MEANINGS OF FOURTH AMENDMENT TERMS SUCH AS "SEARCH," AND TO THE PRECEDENTS THAT SPRING FROM THE FOURTH AMENDMENT'S TERMS

Rather than reasoning backwards from "reasonable expectations" to constitutional protection, this Court should return to the plain meanings of terms, the *Katz* majority's holding, and the more recent holding in *Kyllo v. United States*, 533 U.S. 27 (2001), to find that a "search" occurs when government agents seek out something that is otherwise concealed from view. This turns on facts and law: whether there were physical and legal barriers preventing the government accessing the information or the thing. Thermal imagers and drug-sniffing dogs are designed to expose concealed things. They are paradigmatic tools for searching. When a search has occurred, the Fourth Amendment calls for an examination of its reasonableness.

A. A "search" occurs when government agents seek out that which is otherwise concealed from view, the opposite condition from what pertains when something is in "plain view."

"'Search' consists of looking for or seeking out that which is otherwise concealed from view." *Black's Law Dictionary* 1349. "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.' N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)." *Kyllo v. United States*, 533 U.S. 27, 32 fn. 1 (2001). Dictionary definitions of "search" accord with *Kyllo*. That case held that when government agents use "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40.

The question of whether a search has occurred turns first on whether something is concealed, the opposite of exposed. *Black's Law Dictionary* defines the verb "to expose" as "[t]o show publicly; to display; to offer to the public view, as, to 'expose' goods to sale, to 'expose' a tariff or schedule of rates, to 'expose' misconduct of public or quasi-public figures." *Black's Law Dictionary* 579. Webster's 1828 dictionary defined "to expose" first as "[t]o lay open; to set to public view; to disclose; to uncover or draw from concealment; as, to expose the secret artifices of a court; to expose a plan or design." N. Webster, *An American*

Dictionary of the English Language (1828) (reprint 6th ed. 1989), available at http://tinyurl.com/Cato Jardines5.

These definitions suggest that exposure is a condition that can be determined objectively. The physical location of a thing with reference to other things—say, a letter kept inside the drawer of a desk inside a home—determines whether photons will bounce off it and reach the eyeballs of someone in a place he or she is legally entitled to be. A cat in a yard along the street is exposed because photons it reflects will come to rest in the eyes of passers-by. Physical arrangements determine whether the sound waves a person or thing produces or reflects will reach the ear of someone lawfully nearby. So bedroom conversation inside a home generally cannot be heard on the sidewalk. A shouting match on the front porch is exposed.

This Court has developed simple and administrable rules for the treatment of "exposure" under the Fourth Amendment. The majority in *Katz*, for example, said, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. This Court refined the "plain view" doctrine in *Horton v. California*, 496 U.S. 128 (1990), holding: 1) that the officer seizing evidence must not have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, 2) that the item must have actually been in plain view, and 3) that its incriminating character must have been immediately apparent. *Horton*, 496 U. S. at 136-37.

While this Court administers "plain view" using fairly straightforward application of law to facts, con-

cealment can only be found once a court has run through the doctrinal puzzles and societal pronouncements that the "reasonable expectation of privacy" test requires. It should be that information one conceals from the general public using physics and law one also conceals from the government, unless the legal predicates that justify searches and seizures are met. Precedents of this Court, both pre- and post-*Katz*, support this simple rule, if inarticulately. It is a rule that survives changes in the state of technology.

B. People maintain "privacy" by exercising control over personal information using physics and law.

A welcome point of agreement between the majority and concurrence in this Court's recent *Jones* decision, 132 S. Ct. 945 (2012), was the goal of preserving "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 950 (majority opinion), and 958 (Alito, J., concurring)(quotations omitted). Preserving some past state of affairs with relation to privacy cannot be a clear goal without a command of what privacy is. Though the Fourth Amendment does not require the Court to consider "privacy" per se, examining privacy and its protection can help rationalize protections against unreasonable searches and seizures.

In 1967, the year that the Supreme Court decided *Katz v. United States*, scholar Alan Westin characterized privacy in his seminal book as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Alan Westin, *Privacy and Freedom* 7 (1967). This is the strongest sense of the word "privacy": the enjoyment

of control over personal information. A tighter, more legalistic definition of privacy is: "the subjective condition that people experience when they have power to control information about themselves and when they exercise that power consistent with their interests and values." *See* Jim Harper, *Understanding Privacy—and the Real Threats to It*, Cato Institute, Policy Analysis No. 520 (2004). Given control over information about themselves, people will define and protect their privacy as they see fit.

Whether or not the Fourth Amendment requires courts to preserve some past level of privacy protection, giving individuals the same level of control over personal information is at least a meaningful and judicially administrable goal. One simply has to examine how people controlled information in the past and see that their ability to do so is maintained in the present.

In the late 18th century, people controlled information about themselves by how they arranged the things in the world. Retreating into one's home and drawing the blinds, for example, caused what happened inside to be "private." Lowering one's voice to a level others could not hear made a conversation "private." Draping the body with clothing made the details of its shapes, textures, and colors "private."

A list of all privacy-protecting decisions and behaviors would be very long, and it would not be helpful for crafting lasting privacy-protecting rules. But abstracting the nature of privacy protection can: People protect privacy by preventing others from perceiving things.

Perceiving something is being able to collect and process its representation in physical media. Photons

are media which, upon reaching eyeballs, make a thing visible to a person. Sound waves reaching ear drums make a thing audible to a person. Particulates reaching a person's nostrils or tongue make a thing perceptible by scent or taste. The surface of an object touched or pressed upon by skin can reveal its density, hardness, size, and weight. When a person's brain collects these data, he or she perceives the things in the world. The observer can quickly draw inferences about things, and about the people who own and control them.

When the photons, sounds waves, particulate remnants, and surfaces that reveal things are not available, such things are not perceptible, and the drawing of inferences about people is blocked. This, abstractly stated, is how people protect privacy. They did it this way in the late 18th century, and they do it this way today.

It is not enough, though, for people to withdraw into their homes, lower their voices, or wrap their bodies in clothes. When people enter their homes, they do so relying on the aggregate of rights that prevent others from entering or accessing their homes to discover what goes on within. They rely on property rights. When people put clothing on their bodies to prevent photons from revealing the appearance of sensitive areas, they do so relying on protection against wrongful physical contact that might strip the body of its wrappings. That is the law of battery.

Sometimes people do rely almost entirely on physics to protect privacy, such as when they lower their voices in a public place. And sometimes they rely heavily on law, such as when they share information with a fiduciary or service provider bound to confi-

dentiality by contract or regulation. Purely physical arrangements like whispering are an insufficient part of much privacy protection, though, and purely legal arrangements are rare. Most of the time, people protect privacy using natural laws and human laws together.

C. This Court's cases give Fourth Amendment backing to physical and legal arrangements that control information appurtenant to persons, houses, papers, and effects.

Ex Parte Jackson, 96 U.S. 727 (1877), an early case dealing with the Fourth Amendment status of mail, neatly illustrates the interplay of physics and law in privacy protection. The Court accorded constitutional protection to sealed mail, the content of which was controlled by physics. Protection did not obtain for unsealed mail:

> [A] distinction is to be made between different kinds of mail matter,-- between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers,

> thus closed against inspection, wherever they may be.

Jackson, 96 U.S. at 733.

Letters and packages enclosing their contents in opaque materials had the same security as letters kept in the home. Mailed matter left open had no physical security and thus had no constitutional security. The arrangement of things in the world made things private in a way the Fourth Amendment protects.

In *Olmstead*, this Court failed to adapt that rule to a new technology. When Olmstead and his colleagues spoke on the telephone, a microphone in the handset produced a modulated electrical current that varied its frequency and amplitude in response to the sound waves arriving at its diaphragm. The resulting current was transmitted inaudibly and invisibly along the telephone line to the local exchange, then on to the phone at the other end of the circuit. At its destination, the signal passed through the coil of the receiver and produced a corresponding movement of the diaphragm in the receiving phone's earpiece. This roughly reproduced the sound of Olmstead's conversations.

The signal passing along the electric wire was invisible and inaudible to any human. It could not be perceived and was thus private. Overcoming the protection in physics for Olmstead's communications required some aid to ordinary perception. Chief Justice Taft described how the government tapped the defendants' phones: "Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office" of the conspiracy. *Olmstead*, 277 U.S. at 457.

These wires carried the signal to a coil and diaphragm the government controlled. The diaphragm reproduced the sound of the voices that were otherwise unheard all along the wire. Government agents took the conversations down to use as evidence.

But later in his opinion, Taft denied those facts. Justifying his legal conclusions, he wrote: "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only." *Id.* at 464.

In fact, to make the conversations audible, the government introduced wires into the telephone system and captured the signals it carried. It converted those signals into the sounds they represented and amplified them to replicate conversations. Those actions are not "the use of the sense of hearing, and that only." Those actions made audible something that was concealed, which was a search.

The corrective this Court applied to Fourth Amendment law in *Katz* does not reveal the precise functionality of the bug used to capture Charles Katz's conversations, but it almost certainly worked as a telephone receiver does, by converting sound waves to electrical signals. Assuming those signals were stored on magnetic tape, a tiny magnetic pulse would have reoriented the ferrous molecules coating a tape to match the electrical pulses the sounds produced. When the time came to listen to the tape, a sensor run over it would pick up the magnetic orientation of the molecules and use them to vary electric signals driving a diaphragm. This would reproduce the sounds of Katz's conversations to be taken down and used as evidence.

Crucially, the listening and recording devices were configured to be invisible to Katz. Unable to see the device, and seeing nobody near the phone booth in which he spoke, Katz believed his conversations were private. And they were—but for the FBI agents using high-tech gadgetry to hear what they otherwise could not have heard.

Justice Potter Stewart's majority opinion reversing Katz's conviction rested on the physical protection that Katz had given to his oral communications by going into a phone booth. The holding did not turn on Katz's "expectations of privacy" as Justice John Harlan's concurrence would suggest.

Both parties to the case had fixated on location, assuming based on precedent that being "in private" garnered constitutional protection, while being "in public" meant all bets were off. *Id.* at 351. But, as discussed earlier, an increasingly mobile society and advancing communications technology had rendered physical location a weak proxy for having the interest in security against government intrusion that the Fourth Amendment protects.

Justice Stewart wrote for the Court:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz, 389 U.S. at 351(citations omitted).

In the paragraphs that followed, the Court discussed how Katz had preserved his privacy: he went

into a phone booth made of glass that concealed the sound of his voice. *Id.* at 352. Against the argument that Katz's body was in public for all to see, the Court wrote: "[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.*

Using the physical items around him to husband the sound of his voice, Katz protected his privacy. The government's use of a secreted listening and recording device to enhance ordinary perception overcame Katz's control of that information. It was a Fourth Amendment search that required a warrant.

The majority decision did not raise or explore additional conditions controlling whether phone conversations occurring inside a telephone booth might be protected. The Court later noted that Katz "justifiably relied" on the privacy he enjoyed "while using the telephone booth," *Id.* at 353, but this is simply a conclusion from the fact that it is unreasonable for government agents to invade privacy as they had done. Unfortunately, Justice Harlan would expound on this conclusion in a way that distracted future courts from *Katz*'s actual holding.

It is not only the special problem of communications privacy that benefits from apprehending the physical realities at play in concealment and search. In *Terry v. Ohio*, 392 U.S. 1 (1968), a plain-clothes police detective observed three men acting strangely and became suspicious that they were "casing" a store for a "stick-up." *Id.* at 7. Stopping them some blocks away and receiving unsatisfactory answers to his questions, Officer McFadden "grabbed petitioner Terry, spun him around so that they were facing the

other two . . . and patted down the outside of his clothing." *Id.* at 7.

The government had urged this Court to place brief "stop and frisk" incidents like this outside the Fourth Amendment, *id.* at 16 fn. 12, arguing that police behavior short of a "technical arrest" or a "full blown-search" did not implicate constitutional scrutiny. *Id.* at 19. The Court rejected the idea that there should be a fuzzy line dividing "stop and frisk" from "search and seizure." It wrote with precision about the seizure, then the search, of Terry: "[T]here can be no question ... that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing." *Id. See also Terry*, 392 U.S. at 35 (Douglas, J., dissenting) ("I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a 'search'"). The seizure and search of Terry were reasonable and therefore constitutional.

Consider how physics and law worked in the *Terry* case. Terry and his fellows had not concealed their movements on the street. Officer McFadden, standing in a place he was legally entitled to be, had used his eyes to capture the photons bouncing off the men and the things around them. Visual observation and inference combined to give McFadden an idea that they might be armed.

After he seized Terry and turned him, Officer McFadden placed his hands on Terry's outer garments. Because he had reasonable suspicion, McFadden was allowed to touch Terry in a way that would otherwise have been a battery. He used touch to "seek[] out that which is otherwise concealed from

view." *Black's Law Dictionary*. The hard resistance and weight of the gun were different from the soft resistance of the human body, of clothing, papers, and such, and the gun was found.

The physical media by which information traveled to Officer McFadden in *Terry* are familiar to judges and Fourth Amendment law, so only a year after the *Katz* decision this Court did not resort to "reasonable expectations" analysis. This Court wrote with confidence and clarity about the seizure of Terry, the search it facilitated, and the legal import of both.

The thermal imaging case, *Kyllo*, is a key recent case in which this Court recognized that the Fourth Amendment backs the physical and legal protections individuals throw around the information appurtenant to their persons, houses, papers, and effects. Thermal imaging cameras detect radiation in the infrared range of the electromagnetic spectrum (that is, with longer wavelengths than visible light), and they produce images of that radiation, called thermograms, by representing otherwise invisible radiation in the visible spectrum. Morovision, "How Thermal Imaging Infrared Technology Works" Web page, available at http://tinyurl.com/CatoJardines6. Because the amount of radiation an object emits increases with temperature, one can see variations in temperature as the government agents did. *Kyllo*, 533 U.S. at 29.

As Charles Katz had done by entering a telephone booth, Danny Kyllo used the walls of his house to conceal from others what goes on within, including the temperature of its rooms. As a matter of fact—not expectation—Kyllo had privacy in the temperature of the rooms of his home. When the government used

out-of-the ordinary sense-enhancing technology to "see" temperatures that were otherwise not in view, it was a search requiring a warrant, and it violated his Fourth Amendment rights. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40.

This was the rationale of the *Katz* majority—people who have concealed the information on or about their persons, houses, papers, and effects have also concealed it from the government. Other than in certain narrow cases, such as exigency, the government cannot overcome their privacy with a search except after getting a warrant.

III. THE TRAINED DRUG DOG'S SNIFF AT JOELIS JARDINES'S FRONT DOOR WAS A FOURTH AMENDMENT SEARCH THAT REQUIRED PROBABLE CAUSE AND A WARRANT

It is a search when government agents bring a drug-sniffing dog to the front door of a person's home to examine the home for the presence of drugs. The dog makes perceptible what otherwise was not perceptible. Such a search is presumptively unreasonable without a warrant. This drug-sniffing dog case is on all fours with *Kyllo*.

Olfaction is a dog's primary sense. Dogs have more than 220 million olfactory receptors in their noses, compared to only about 5 million in humans. Julio E. Correa, *The Dog's Sense of Smell*, Alabama A&M and Auburn Universities UNP-0066 (2011), at

1, available at http://tinyurl.com/CatoJardines7. This enables them to sense airborne particulates and gasses at much lower concentrations than humans can. Properly trained using Pavlovian classical conditioning, a dog is turned into a signaling device. It will indicate where it has sensed the presence of trained-for molecules at concentrations too low for humans to perceive. The details are very different, but the result is the same as with a device that converts invisible infrared radiation into visible-spectrum imagery: The human operator can perceive things that are otherwise imperceptible.

The use of a drug-sniffing dog is a "search" in ordinary legal language and the nearest precedent of this court. The sniff of such a dog "look[s] for or seek[s] out that which is otherwise concealed from view." *Black's Law Dictionary* 1349. It is "'look[ing] over or through for the purpose of finding something.' Webster 66." And it is use of "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo*, 533 U.S. at 40.

Put to use in drug detection, a dog is a technological device. Detecting compounds through the use of an animal applies scientific principles (more or less well) to a practical problem. Dog detection parallels other forms of chromatography. *See, e.g.*, Kenneth G. Furton et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction–Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, J. Chromatographic Science, Vol. 40 (March 2002), available at http://tinyurl.com/CatoJardines8; Bogusław Buszewski et el., *Identification of volatile lung*

cancer markers by gas chromatography–mass spectrometry: comparison with discrimination by canines, J. Analytical & Bioanalytical Chem. (Jun. 3, 2012), available at http://tinyurl.com/CatoJardines9. Without prejudice to the affection between a drug-sniffing dog and its handler (as well as your *amicus*'s affection for dogs generally), detector-dog literature refers to detector dog teams as "equipment." *See History of Drug Dogs*, K9 Global Training Academy ("As of now there is no single piece of police equipment that can perform as many functions, or perform as reliably as a well-trained detector dog team."), available at http://tinyurl.com/CatoJardines10.

The widespread existence of dogs in society, and their use historically and presently in other kinds of detection, does not make the drug detection capabilities of specially trained dogs commonplace. In *Kyllo*, this Court rightly limited the "search" concept to use of devices "not in general public use," *Kyllo*, 533 U.S. at 40, which distinguishes common enhancements to ordinary perception, including such things as spectacles, hearing aids, and flashlights. *See United States v. Lee*, 274 U.S. 559, 563 (1927); *Texas v. Brown*, 460 U.S. 730, 739-740 (1983); *United States v. Dunn*, 480 U.S. 294, 305 (1987). These devices people can anticipate others using as they arrange their affairs for privacy protection.

A drug-sniffing dog is not ordinary. It is a product of rare and special training, and of familiarity between the dog and its handler. People do not anticipate friends and neighbors examining the molecular content of the air around themselves, their houses, and their things, so they do not arrange their affairs to frustrate such examinations and protect privacy.

When a government agent guides a drug-sniffing dog in an examination of a person's house or effects, he uses the technology's uncommonness to learn information he otherwise could not.[4] This is a search.

As this Court held in *Kyllo*, such searches are "presumptively unreasonable without a warrant." 533 U.S. at 40. This Court should uphold the judgment of the Supreme Court of Florida on these grounds.

CONCLUSION

This Court could apply Fourth Amendment "reasonable expectation" doctrine to resolve this case. The home and curtilage are areas where people typically and reasonably do expect privacy. But electrical tape and baling wire can only hold the jalopy of "reasonable expectation" doctrine together for so long. Intractable problems will continue to rise to this Court from lower courts struggling to apply confused doctrine.

This Court should revise search and seizure law so it hews more closely to the language of the Fourth Amendment, and so that courts are faced with more clear and more methodical application of facts to law in Fourth Amendment cases. This Court should find a "search" to have occurred in this case because the use of a drug-sniffing dog made perceptible to government agents what they otherwise could not perceive.

Doing so will shift the locus of judging in Fourth Amendment cases back to where the Fourth Amendment calls for it—on the question of reasonableness in searching. This Court, lower courts, law enforce-

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[4] The trial court declined to treat an investigator's later report of detecting suspicious odor sufficient to establish suspicion. *See Jardines v. State*, 73 So. 3d 34, 55 (Fla. 2011).

ment, and the citizenry will be better off for having clear rules that are consistent with the Fourth Amendment's language.

Were this Court to maintain or endorse the *Jacobsen/Caballes* corollary to *Katz* doctrine, it would not only allow dog sniffs wherever government will or whim takes them, but all manner of technical inspection, analysis, monitoring, and many other synonyms for what is rightly known as "searching."

The Fourth Amendment is part of a document that girds human freedom. It helps to ensure that the individual is a sovereign, endowed by the Creator with inalienable rights to life, liberty, and the pursuit of happiness. The Fourth Amendment is not a surveillance management tool for a government endowed with 300 million people to tend as a flock. While the good-faith efforts of courts since *Katz* to manage "privacy" is welcome, it would be better to let Americans manage their own privacy, backed by this Court and the Fourth Amendment when they use physics and law to conceal personal information as they wish.

Respectfully submitted,

JAMES W. HARPER
Counsel of Record
ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
jharper@cato.org

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

No. 11-564

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICI CURIAE* FOURTH AMENDMENT SCHOLARS IN SUPPORT OF RESPONDENT

LESLIE A. SHOEBOTHAM
Associate Professor of Law
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS
COLLEGE OF LAW
7214 St. Charles Ave.
New Orleans, LA 70118
(504) 861-5683
shoeboth@loyno.edu

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTRODUCTION

The *amici curiae* submit this Brief in support of Respondent, and urge the Court to affirm the decision of the Florida Supreme Court.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors and scholars in Fourth Amendment studies. *Amici* submit this brief in support of Respondent's position that a warrantless canine drug-detection sniff performed at the front door of a private residence violates the Fourth Amendment. No other brief submitted in this case considers the scientific literature concerning canine drug-detection sniffs and analyzes how those scientific findings impact the legal analysis of canine home-sniffs.

[1] The parties have consented to the filing of this brief in letters submitted to the Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

A canine drug-detection sniff of a home is a search under the Fourth Amendment because the sniff is a sense-enhancing tool that provides police information about a home's interior – information that would not otherwise be obtained without physical entry into the home. *Cf. United States v. Karo*, 468 U.S. 705, 715 (1984). Warrantless police entry into the home is the "chief evil" against which the Fourth Amendment was intended to prevent. *United States v. United States District Court*, 407 U.S. 297, 313 (1972). In addition to requiring a warrant for police physically to enter a home, *see Payton v. New York*, 445 U.S. 573, 590 (1980), a warrant is also required when police direct a device at a home to gain information, even if that device does no more than provide measurements that enable police to *infer* that illegal activity is taking place inside. *See Kyllo v. United States*, 533 U.S. 27, 34 (2001).

Although it was once believed that drug-detection dogs alert solely to contraband – *see United States v. Place*, 462 U.S. 969, 707 (1983) (describing a canine sniff as "*sui generis*" because "the sniff discloses only the presence or absence of narcotics, a contraband item") – scientific research now establishes that drug-detection dogs do not alert to the contraband itself. Instead, drug-detection dogs alert to certain volatile[2]

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[2] "Volatile" means "[r]eadily pass[ed] off by evaporation." McGraw-Hill Dictionary of Scientific and Technical Terms 2267 (6th ed. 2003).

substances – generally, break-down products of the illegal drug. These decomposition odor constituents are in no way illegal or even unique to contraband. In fact, these volatile molecules or compounds are also found in substantial quantities in ordinary household items. Therefore, rather than detecting the contraband itself, a detection dog's alert to these entirely-legal molecules or compounds instead produces an *inference* that contraband is *also* present.

For canine sniffs performed in lesser-privacy contexts (i.e., sniffs of luggage at airports, *Place*, 462 U.S. at 707, or lawfully-stopped vehicles, *Illinois v. Caballes*, 453 U.S. 405 (2005)), the inferencing on which the canine-sniff technique relies generates the subsidiary question of the individual dog's "reliability" for contraband detection. For canine sniffs of the home, however, the "search" issue must not collapse into a simple tally of the detection dog's training and field accuracy. The Fourth Amendment requires more. The home is the constitutionally protected area that is afforded the highest Fourth Amendment protection. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Similar to *Kyllo*, the canine-sniff technique is a sense-enhancing tool that reveals non-contraband information from which police *infer* that contraband is hidden inside the home.

Because the canine-sniff techniques relies on detection of noncontraband molecules and compounds within a home as the basis to infer that contraband is hidden inside, a canine drug-detection sniff is "capable of detecting lawful activity" within the home. *See*

Caballes, 543 U.S. at 409-10. Scientific research establishes that instead of smelling cocaine, drug-detection dogs alert to methyl benzoate – an odor shared by snapdragons, petunias, perfumes and food additives. Instead of smelling heroin, drug-detection dogs alert to acetic acid – an odor shared by vinegar and aspirin that is past its prime. Instead of smelling MDMA ("Ecstasy"), drug-detection dogs alert to piperonal – an odor shared by soap, perfume, food additives and even lice repellant. Law enforcement is well-aware of this research and in fact uses these specific, noncontraband molecules and compounds to prepare pseudo drug training aids – devices which train drug-detection dogs and reinforce their field training – to alert to these precise substances, not a more complex odor signature for contraband. And because these shared smells – entirely-lawful odor constituents – are readily found in homes throughout the country, canine drug-detection sniffs may reveal lawful activity within the home.

To view *Kyllo*'s understandable concern about "advancing technology" and its potential to "shrink" Fourth Amendment protection for the home, *see Kyllo*, 533 U.S. at 34, 35, as a *limitation* on Fourth Amendment protection against similarly-intrusive police investigation would be more than ironic; it cuts against the Court's steadfast refusal to allow labels to be used as pidgeonholes to cabin Fourth Amendment protection. *See, e.g., Katz v. United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring) (observing that limiting Fourth Amendment protection to cases

involving physical penetration of a constitutionally protected area would "in the present day, [be] bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion."). A canine drug-detection sniff is a "search" under the Fourth Amendment because it is a sense-enhancing police tool that reveals information about the home that would not otherwise be obtained without physical entry.

For these reasons the Court should affirm the Florida Supreme Court and hold that a canine drug-detection sniff conducted at the front door of a home is a search under the Fourth Amendment.

ARGUMENT

Scientific research reveals that courts should not be outfoxed by the concept of the infallible dog. Since *Illinois v. Caballes*,[3] we now know that drug-detection dogs alert to certain volatile[4] substances – generally, break-down products of the illegal drug – not the illegal drug itself. These volatile alert-producing substances are not themselves illegal and, in fact, are found in substantial quantities in ordinary household items. Therefore, a positive canine sniff produces

[3] 543 U.S. 405 (2005) (finding that the warrantless canine sniff of the exterior of a lawfully-stopped vehicle was reasonable under the Fourth Amendment).

[4] *See* note 2, *supra*.

nothing more than an inference that contraband is also present. This inference may be reliable enough in close-proximity sniffs involving lesser expectations of privacy – luggage at an airport, *United States v. Place*, 462 U.S. 696, 707 (1983), or lawfully stopped vehicles, *Caballes*, 543 U.S. at 409 – to support the warrantless use of canine sniffs. But acceptance of the canine-sniff inference in such lower-privacy contexts does not mean that a canine sniff of the home should be treated the same way.

First, the home is afforded the most stringent Fourth Amendment protection – protection from physical intrusion to gain information as well as police use of devices that serve as surrogates for physical intrusion, either by providing (1) direct access to the home's interior, or (2) information that allows police to draw inferences about what is going on inside the home. Here, the canine drug-detection sniff makes possible sense-enhanced police inferencing about the interior of the home that is analogous to the technology-assisted inferencing about a home's interior that the Court rejected in *Kyllo v. United States*, 533 U.S. 27 (2001), and *United States v. Karo*, 468 U.S. 705 (1984).

Second, the information disclosed by a canine home-sniff requires careful consideration. Science has thrown back the curtain from the fiction of the *sui generis* canine sniff. To be sure, drug-detection dogs are trained to detect specific odors and to alert based upon recognition of those odors. But the desire to link a canine alert to the "odor of contraband" is an appeal

to anthropomorphic fantasy – more akin to Aesop's fables than science-based reality. There is no such thing as the "odor of contraband" because drug-detection dogs are not trained to alert to odors *unique* to contraband. Instead, detection dogs are trained to alert to odors *shared* with flowers, perfume, soap, insecticide, food additives, vinegar, cleaning supplies – and the list goes on and on. The volatile molecules or compounds to which the drug-detection dog alerts are not themselves illegal and are present in ordinary household items. Therefore, canine home-sniffs are "capable" of revealing noncontraband information about the home's interior. *See Caballes*, 543 U.S. at 409-10.

On a related issue, the canine-sniff technique's accuracy when used to detect contraband hidden inside a home has not been studied scientifically, and is therefore an unknown. Significantly, however, the State of Florida's "residual odor" argument[5] posed in its Petition for a Writ of Certiorari in *Florida v. Harris*, if accurate, raises a red flag for canine home-sniffs since people generally have less control over access to their front doors than they do personal items like luggage or car trunks. Relying on nothing

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[5] The State asserts: "A dog's superior sense of smell allows it to detect trace amounts and residual odors of a drug that may remain after the odor-emanating drug is no longer present, or that may be carried by any object or a person who had contact with drugs in another location." Petition for a Writ of Certiorari at 18 *Florida v. Harris*, *cert. granted*, 132 S.Ct. 1796 (2012) (No. 11-817), 2011 WL 6934743 at *18 [hereinafter *Harris* Pet.].

more than the certainty of circular rhetoric, the State of Florida's position that warrantless canine home-sniffs should be permissible is scientifically flawed and legally simplistic.

I. Warrantless Canine Drug-Detection Sniffs of the Home Violate the Fourth Amendment Because Canine Sniffs Are a Sense-Enhancing Tool That Allows Police To Infer That Contraband Is Present and Warrantless Sense-Enhanced Inferencing About a Home's Interior Violates the Fourth Amendment

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. A "search" for Fourth Amendment purposes occurs when the government intrudes on a person's "constitutionally reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The Court has recently reminded that a search also occurs when the government "physically occupie[s] private property for the purpose of obtaining information." *United States v. Jones*, 132 S. Ct. 945, 949 (2012). The home is a constitutionally protected area for which the Court has afforded the "most stringent" Fourth Amendment protection. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Absent exigent circumstances, the Court prohibits warrantless physical entry into the home. *See Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978).

A. Sense-Enhanced Police Inferencing About a Home's Interior Violates the Fourth Amendment Because It Reveals Information That Would Not Otherwise Have Been Obtained Without Physical Entry Into the Home

In addition to prohibiting warrantless physical entry into a home, the Court also prohibits the warrantless use of analogs for physical entry – sense-enhancing devices that reveal information about the home's interior. In *United States v. Karo*, a federal agent learned that the defendants planned to purchase ether from a confidential informant for use in extracting cocaine from imported clothing. 468 U.S. at 708. Pursuant to a warrant (which was later invalidated) and the informant's consent, the agents installed a beeper into a can of ether that was eventually delivered over to the defendants. *Id.* The agents used the beeper to track the can's location as it was moved from place to place, including several houses. *Id.* at 708-09. Tracking the beeper enhanced the agents' observation of these houses because it revealed the location of the houses into which the can was taken and, as the investigation went on, disclosed whether the can remained present inside. *Id.* at 715. *Karo* equated the agents' beeper-assisted surveillance of the houses to warrantless physical entry to determine whether the can was still there, a clearly impermissible investigation strategy, *id.* at 715, and held that monitoring the beeper after it was withdrawn into a private residence was a search under the Fourth Amendment. *Id.* at 714.

Despite the reliability of the information that the beeper revealed,[6] the Court required a warrant to track the beeper's location within a home because the beeper disclosed "a critical fact about the interior of the premises that the Government is extremely interested in knowing. . . ." *Id.* at 715. As *Karo* explained: "Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Id.* at 716.

Like the beeper in *Karo*, the thermal imager in *Kyllo* also enhanced the officer's ordinary perceptions. 533 U.S. at 35 n.2 (observing that "on the night [that the thermal scan was performed], no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging."). The thermal scan, conducted from the lawful vantage point of a public street, revealed temperature gradients that were consistent with high-intensity lights used in an indoor marijuana growing operation. *Id.* at 30. In finding that the warrantless use of the thermal imager violated Kyllo's reasonable expectation of privacy, *Kyllo* framed the issue as "what limits there are

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[6] Although the beeper was "not sensitive enough" to identify the specific storage locker in storage facilities where the defendants hid the beeper-infected can at various times, the beeper did reveal, apparently with complete accuracy, the houses into which the can was taken. *See id.* at 708-09.

upon this power of technology to shrink the realm of guaranteed privacy." *Id.* at 34.

Kyllo held that a warrant was required to perform the thermal scan of Kyllo's home, explaining that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search – at least where (as here) the technology in question is not in general public use." *Id.* at 34 (*quoting Silverman v. United States*, 365 U.S. 505, 512 (1961)) (internal citation omitted). In requiring a warrant, *Kyllo* rejected the dissent's proposed distinction between devices that provide direct access to the home's interior (so-called "through-the-wall" technologies) and those that simply enabled police to draw inferences about what was going on inside a house. *Id.* at 36. As the majority explained, while inferencing alone was not a search, the thermal imager provided a measurement (the relative heat emanating from portions of Kyllo's home) that allowed police to infer information about the home's interior. *Id.* at 37 n.4. Thus, the thermal scan was a search because it provided information to police that made possible their technology-assisted inference that Kyllo was growing marijuana inside his home.

In addition to *Kyllo*'s concern that technological advances could "erode the privacy guaranteed by the Fourth Amendment," *id.* at 34, the Court also noted the importance of providing to law enforcement "clear specifications of those methods of surveillance that

require a warrant." *See id.* at 40. The value of providing clear guidelines for police investigation of the home may dovetail with *Karo*'s observation that requiring a warrant to track a beeper inside a house would have the "salutary effect" of preventing police "abuse" of the device. *See Karo*, 468 U.S. at 717.

i. Warrantless Use of a Sense-Enhancing Aid To Obtain Information About a Home Violates the Fourth Amendment, Even If the Sense-Enhancing Aid Is Not a Device or Advancing Technology, If the Sense-Enhancing Aid Reveals Information That Would Not Otherwise Have Been Obtained Without Physical Entry

Unlike the naked-eye aerial surveillance of a home's curtilage that the Court approved in *Florida v. Riley*, 488 U.S. 445 (1989) and *California v. Ciraolo*, 476 U.S. 207 (1986), a canine drug-detection sniff enhances the human officer's ordinary sense of smell,[7]

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[7] Although *Ciraolo* allowed police to use the technology of air flight to gain a better vantage point from which to make an inspection of the suspect's curtilage, the Court has noted that the officer there did no more than look at the curtilage without sense-enhancement of the officer's ordinary eyesight. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 234-35 (1986) ("In *California v. Ciraolo*, decided today, we hold that *naked-eye* aerial observation from an altitude of 1,000 feet of a backyard within the curtilage of a home does not constitute a search under the Fourth Amendment.") (citation omitted) (emphasis

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and additionally, requires physical invasion into the home's curtilage in order to conduct. A warrant is required for police to use a device to gather information that is otherwise secreted within a home, even if that device simply substitutes for the officer's own perceptions. *See Kyllo*, 533 U.S. at 35 n.2 ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."). It cannot be gainsaid that a canine drug-detection sniff enhances, not just substitutes for, a human officer's ordinary sense of smell. *See, e.g.*, Brent A. Craven, et al., *The fluid dynamics of canine olfaction: unique nasal airflow patterns as an explanation of macrosmia*, 7 J. Royal Soc'y Interface 933, 933 (2010) ("The olfactory acuity of the dog . . . is roughly 10 000-100 000 times that of the human.") (citation omitted) (commas omitted in original).

Regardless of what canine handlers may believe is occurring when a drug-detection dog alerts,[6]

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added); *cf. United States v. Jones*, 132 S. Ct. 945, 953 (2012) ("This Court has to date not deviated from the understanding that *mere* visual observation does not constitute a search.") (*citing Kyllo*, 533 U.S. at 31-32) (emphasis added).

[6] Almost all of our understanding of the canine-sniff investigative technique arises from anecdotal discussions in judicial opinions concerning the individual detection dog at issue, not scientific studies. *Compare R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 2008 SCC 18 ¶ 15 (Can.) (four Justices of the Canada Supreme Court observing, "[t]he available information is in essence limited to the facts that . . . police officers believe in [detection dogs'] overall reliability and to the praise of a particular dog

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detection dogs react to volatile, organic molecules or compounds which are not themselves illegal. *See, e.g.*, Michael Macias, et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab. 16 (2008), *available at* http://www.pawsoflife.org/Library/Detection/Marcias.pdf ("It has been shown that canines respond to volatile organic compounds (VOCs) in the headspace above the drug instead of the parent compound itself."). Therefore, a positive canine alert produces nothing more than an inference that contraband is also present. In fact, it is the sniff technique's reliance on inferencing, rather than detection of the contraband itself, that generates the separate issue of the individual detection dog's "reliability" for contraband detection. For this reason, the canine-sniff inference is nothing like the contraband-specific chemical test at issue in *United States v. Jacobsen*. 466 U.S. 109, 122 (1984) (finding that the chemical field test of a lawfully-seized white powder that the agent suspected was cocaine did not violate the Fourth Amendment because the test revealed only whether the powder was cocaine and "nothing more, not even whether the substance was sugar or talcum powder.").

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deployed. . . .") *with* Lisa Lit, et al., *Handler beliefs affect scent detection dog outcomes*, 14 Animal Cognition 387, 393 (2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3078300/pdf/10071_2010_Article_373.pdf (finding "that handler beliefs affect working dog outcomes, and human indication of scent location affects distribution of alerts. . . .").

Kyllo's understandable concern about "advancing technology" and its potential to "shrink" Fourth Amendment protection for the home notwithstanding, *see Kyllo*, 533 U.S. at 34, 35, the warrantless use of the thermal imager there violated the Fourth Amendment because it allowed police to infer what was going on inside Kyllo's home. Regardless of whether future devices might come to reveal more detailed thermal images than the "relatively crude" measurement of radiant heat described in *Kyllo*, *see id.* at 36, *Kyllo*'s primitive scan violated the Fourth Amendment because it disclosed information that would not otherwise have been obtained without physical entry into the home. Therefore, any attempt to label canine drug-detection sniffs as "technology" or "advancing technology," *cf. id.* at 35, as a starting point to determining whether a warrant is required or, instead, to label the detection sniff as a "natural" aid, as the United States military describes it,[9] are unnecessary and, perhaps, beside the point. The

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[9] Military R. Evid. 313(b) provides in pertinent part: "Inspections shall be conducted in a reasonable fashion . . . [and] may utilize any reasonable *natural* or technological *aid*. . . ." (emphasis added). As the Manual for Courts-Martial explains, "[a]n inspection is conducted for the primary function of ensuring mission readiness. . . ." Manual for Courts-Martial United States App. 22, Military R. Evid. 313(b), A22-21 (2008 ed.), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf. Due to their importance, unscheduled inspections may be conducted on the "intentionally minimal" standard of reasonable suspicion. *Id.* at A22-23. Rule 313(b) means that "dogs may be used to detect contraband in an otherwise valid inspection for contraband." *Id.*

essential question – does the sense-enhancing police tool reveal information about the home that would not otherwise be obtained without physical entry – remains unaffected by these labels and must be answered in the affirmative for canine sniffs of the home.

ii. *Illinois v. Caballes*'s Treatment of the Canine-Sniff Technique Does Not Control the Outcome For Warrantless Canine Sniffs of the Home

For sense-enhancing devices directed at the home, it is important to distinguish between the "capability" of a sense-enhancing tool to reveal noncontraband information about the home as contrasted with the tool's "accuracy" in detecting contraband. On the accuracy issue, at present there are no scientific studies that consider the reliability of the canine-sniff technique when performed on the exterior of a house in order to detect contraband hidden inside. The lack of scientific study concerning canine home-sniffs as well as potential canine-sniff impediments in a home-setting counsels caution in extending the warrantless use of canine sniffs beyond the close-proximity sniffs of luggage and vehicles. *Cf.* Gary Settles, *Sniffers: Fluid-Dynamic Sampling for Olfactory Trace Detection in Nature and Homeland Security – The 2004 Freeman Scholar Lecture*, 127 J. of Fluids Eng'g 189, 199 (2005), *available at* http://www.mne.psu.edu/psgdl/Pubs/2005-Settles-JFE.pdf (explaining that a detection dog's ability to "read" an

olfactory "message" is directly tied to "proximity sniffing").

But for inferencing about the home, warrantless use of even reliable sense-enhancing tools violates the Fourth Amendment. *Cf. Karo,* 468 U.S. at 708-09 (beeper revealing, with apparently-perfect accuracy, the location of the houses involved). In *Kyllo*, for example, nothing in the Court's treatment of thermal scans suggests that police were wrong very often, or ever, about whether the heat-generating activity detected within the home was a marijuana growing operation or instead a lawful horticultural pursuit, like orchid growing. *Cf. Kyllo*, 533 U.S. at 38 (stating that the thermal imager "*might disclose*, for example, at what hour each night the lady of the house takes her daily sauna and bath. . . .") (emphasis added). It was the fact that police used a sense-enhancing device to deduce what Kyllo was doing inside his home that motivated *Kyllo*'s protective result, not the odds that police might have been wrong about the conclusion the thermal imager enabled them to draw. As the Court later explained in *Caballes*, "[c]ritical to [the *Kyllo*] decision was the fact that the device was *capable* of detecting lawful activity – in that case, intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.'" 543 U.S. 405, 409-10 (2005) (*quoting Kyllo*, 533 U.S. at 38) (emphasis added). Therefore, in the home context it is the *capability* that a sense-enhancing tool might detect lawful activity that was important in *Caballes*, not the likelihood that it would do so.

For canine sniffs of the home, the importance of distinguishing between "capability" and "reliability" cannot be overstated. Although Caballes argued that drug-detection dogs alerted to noncontraband, he did so to bolster his view that the canine sniff technique was unreliable, an argument that the *Caballes* majority rejected. *Id.* (Court finding no evidence in the record to support Caballes's argument that detection-dog error rates called into question whether the dogs alerted only to contraband). Aside from Caballes's false-alert argument, the Court was not called upon to consider whether a detection dog actually alerts to the illegal drug or instead to substances that are found in both the illegal drug and lawful household items, and whether a canine home-sniff is a context in which that distinction should make a difference. Therefore, whether a canine drug-detection sniff is "capable" of revealing noncontraband information about the home was not addressed by *Caballes*.

B. Scientific Evidence Demonstrates That Drug-Detection Dogs Alert To Non-contraband Substances, Not the Illegal Drug Itself

The issue is not *that* a dog can smell; instead, the issue is *what* the dog smells. Studies show that drug-detection dogs alert to certain volatile substances that are found in street drugs, not the illegal drug itself. *See, e.g.*, Norma Lorenzo, et al., *Laboratory and field experiments used to identify* Canis lupus *var.* familiaris *active odor signature chemicals from drugs,*

explosives, and humans, 376 Analytical and Bioanalytical Chemistry 1212, 1213 (2003) ("Previous studies with narcotics detector dogs have shown that the dogs alert to volatile odor chemicals associated with drugs rather than the parent drug itself."). Therefore, a drug-detection dog does not alert to contraband, but instead to the odor of an organic molecule or compound that the dog is trained to *associate* with contraband. The State of Florida comes close to admitting as much in *Harris*. *See Harris* Pet. at 20 (asserting that "the drug detection dogs used by federal agencies are trained to detect the odor of narcotics and not the presence of contraband."); *see also id.* at 23 n.5 (describing that U.S. Customs and Border Protection ("Customs") trains its detection dogs "to detect the odor of contraband and not to the presence of the drug.").

i. Cocaine and Methyl Benzoate

Snapdragons. Petunias. Perfume. Food additives. Cocaine. Common to all of these items is methyl benzoate, also known by its more "romantic" name, Oil of Niobe.

In cocaine, methyl benzoate is a decomposition product or break-down product that is produced when cocaine hydrochloride is exposed to humid air. *See* L. Paul Waggoner, et al., *Canine olfactory sensitivity to cocaine hydrochloride and methyl benzoate, in* Chemistry- and Biology-based Technologies for Contraband Detection 216, 216 (Pierre Pilon & Steve Burmeister

eds., 1997). Methyl benzoate is a volatile, aromatic molecule, and its particular, sweet-smelling odor is detectible in the air, or "headspace," associated with the drug. *Cf.* Robert A. Raguso & Olle Pellmyr, *Dynamic headspace analysis of floral volatiles: a comparison of methods*, 81 OIKOS 238, 239 (1998) (describing methods of collecting "floral scent compounds" for "[h]eadspace analysis" of volatile scent compounds). Studies show that drug-detection dogs alert to methyl benzoate, rather than cocaine itself. Kenneth G. Furton, et al., *Field and Laboratory Comparison of the Sensitivity and Reliability of Cocaine Detection on Currency Using Chemical Sensors, Humans, K-9s and SPME/GC/MS/MS Analysis*, *in* Investigation and Forensic Science Technologies 41 (Kathleen Higgins ed., 1998) ("To date, the only chemical found to produce consistent drug dog alerts [for cocaine detection] has been methyl benzoate.").

In fact, some drug-detection dogs are trained to alert *exclusively* to methyl benzoate, not cocaine.[10] Other drug-detection dogs, such as those used by Customs, undergo field training for cocaine detection

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[10] In civil forfeiture proceedings, canine detection of methyl benzoate provides a way for law enforcement to distinguish money that is seizable because of its connection to drug trafficking from money in general circulation (because of circulated currency's contamination with cocaine residue). *United States v. Funds in the Amount of Thirty Thousand Six Hundred Seventy Dollars ($30,670.00)*, 403 F.3d 448, 458 (7th Cir. 2005). Therefore, some drug-detection dogs are trained to alert *solely* to methyl benzoate, not cocaine. *Id.*

using methyl benzoate training devices.[11] *See* Chad H. Dowell, Dept. of Health and Human Servs., Health Hazard Evaluation Report 2004-0012-2948 U.S. Customs and Border Protection Canine Enforcement Training Center Front Royal, Virginia 1 (2004), *available at* http://www.cdc.gov/niosh/hhe/reports/pdfs/2004-0012-2948.pdf (describing that Customs uses "pseudo drugs" as training aids, which Customs produces itself in its "pseudo building" located at its facility). Although the phrase "odor of contraband" might suggest that detection dogs are trained to detect a complex bouquet of aromas or a unique odor signature for cocaine, in fact, detection dogs trained to alert to pseudo cocaine are exposed to methyl benzoate and no other volatile substance. *Cf. id.* at 1-3 (based upon a master list of substances that Customs identified as training-aid constituents, *see id.* at 1, it appears that the sole *volatile* constituent in Customs's pseudo cocaine is methyl benzoate).[12]

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[11] A pseudo drug training device is prepared by placing a specified amount of the pseudo drug required – here, methyl benzoate – into a heat-sealed plastic bag, which is then placed inside a delivery system, such as PVC pipe, for use as "hides" in detection dog field training. *Cf.* Michael Macias, et al., *Detection of piperonal emitted from polymer controlled odor mimic permeation systems utilizing* Canis familiaris *and solid phase microextraction-ion mobility spectrometry*, 195 Forensic Sci. Int'l 132, 133, 134 (2010) (describing the preparation of a pseudo drug training device for detection of Ecstasy using piperonal).

[12] Customs's preparation of "pseudo drugs" or "pseudo narcotics" includes the use of "acetic acid, benzaldehyde, methyl benzoate, piperonal, cab-o-sil,® and microcrystalline cellulose." *Id.* By a process of elimination, it appears that methyl benzoate

(Continued on following page)

Like the excessive heat detected in *Kyllo* (which, while suspicious, was not itself unlawful), methyl benzoate is a lawfully-possessed molecule that is associated with many ordinary household items, not just cocaine. In fact, methyl benzoate is found in such abundance in household sources that it surpasses a detection dog's sniff threshold. Methyl benzoate is produced by flowers – like snapdragons and petunias; its sweet smell serves as an airborne chemical attractant for pollinating insects. Natalia Dudereva, et al., *Developmental Regulation of Methyl Benzoate Biosynthesis and Emission in Snapdragon Flowers*, 12 Plant Cell 949, 949, 950 (2000), *available at* http://www.plantcell.org/content/12/6/949.full.pdf (identifying methyl benzoate as a floral scent of more than thirty flower species). Importantly, a snapdragon's or petunia's methyl benzoate emission is *on-going* until the flower is pollinated. *See* Florence Negre, et al., *Regulation of Methylbenzoate Emission after Pollination in Snapdragon and Petunia Flowers*, 5 Plant Cell 2992, 2992 (2003), *available at* http://www.plantcell.

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is the sole volatile constituent of Customs's pseudo cocaine. To explain, acetic acid is the volatile constituent of pseudo heroin, benzaldehyde is the volatile constituent of pseudo methamphetamine, and piperonal is the volatile constituent of pseudo MDMA, leaving, by elimination, methyl benzoate as the sole volatile substance in Customs's pseudo cocaine. *Cf. id.* Additionally, Customs's pseudo drug preparations are distributed throughout the country for use in canine drug-detection field training. *Id.* (describing that after preparation, "the pseudo drug is transferred and weighed into smaller bags for shipment throughout the country.").

org/content/15/12/2992.full.pdf (explaining that plants "emit scent at maximum levels when [their] flowers are ready for pollination" and that "[t]he scent of many flowers is reduced markedly soon after pollination."); *see also* Dudereva, *supra*, at 954 (explaining that the snapdragon's emission of methyl benzoate is "four times higher during the daytime than at night.").

If the ordinary snapdragon flower emits 56.5 micrograms of methyl benzoate in a twenty-four hour period, *see* Dudereva, *supra*, at 950, then a bouquet of twenty flowers would emit 1130 micrograms of methyl benzoate per twenty-four hours. Even if, for argument's sake, one averages the bouquet's methyl benzoate emission over the entire twenty-four hour period (which would be incorrect since the snapdragon's emission of methyl benzoate is four times higher during the day, *see id.*), the bouquet would emit 47.1 micrograms of methyl benzoate per hour. And if a drug-detection dog readily alerts to 10 micrograms of methyl benzoate,[13] then it follows that more substantial sources of methyl benzoate – like snapdragons or petunias – are capable of triggering a detection dog's

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[13] *See* Furton, *Field and Laboratory*, *supra*, at 44, Table 2 (stating that for "Pseudo cocaine in Bill [currency] that detection dogs alerted with "80% (4/5)" accuracy to "10 µg [micrograms] Methyl Benzoate in White Paper"). A 10-microgram alert threshold is used here because it is likely a conservative value; other studies show canine drug-detection alerts in response to substantially smaller amounts of methyl benzoate. *See* Lorenzo, *supra*, at 1213-14 (noting that the "effective dose for 50% of the canines and humans tested is approximately 1 µg [microgram] of methyl benzoate spiked onto currency.").

alert. Here, methyl benzoate's well-documented volatility or rapid evaporation rate – which in other contexts (like civil forfeiture proceedings) helps to ensure that cocaine is present or had been recently present – works *against* a home's occupants because flowers churn out methyl benzoate on an on-going basis, *see* Negre, *supra*, at 2992, which arguably may mimic the appearance of a fresh cocaine source. Because the methyl benzoate production of unpollinated flowers exceeds the minimum threshold required to trigger most detection-dog alerts, there is no way to know whether the detection dog sniffing at a front door has alerted to the flower arrangement that the lady (or gentleman) of the house has displayed in the foyer without physical entry into the home to identify the methyl benzoate source.

Additionally problematic, methyl benzoate, or Oil of Niobe as the perfume industry calls it, is a common ingredient in perfumes. P. Aggarwal, et al., *The Use of Thermogravimetry to Follow the Rate of Evaporation of an Ingredient Used in Perfume*, 49 J. of Thermal Analysis 595, 596 (1997) ("Methyl benzoate is used as a base in certain perfumes. It is found in essential oils and has a dry fruity, slightly phenolic odor."). While some say there is not enough methyl benzoate in perfume to trigger a detection dog's alert,[14] regardless

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[14] For illustration purposes (which are not intended to suggest legal authority), expert testimony on this point was given in a civil forfeiture case, which is available as an unpublished decision. *See United States v. $60,020.00 in U.S. Currency*, ___ F. Supp. 2d ___, 2011 WL 4720741, at *3 (W.D.N.Y.

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of how much methyl benzoate is present in an individual spritz of perfume, logic dictates there is much more of this sweet-smelling molecule in the contents of an entire bottle. *Cf. Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 474 (5th Cir. 1982) (in a Section 1983 case arising from a false-positive canine sniff of a schoolchild, the student had a small bottle of perfume in her purse); *see also Jacobsen v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 534-35 (Minn. 2007) (Hanson, J., concurring) (noting that "methyl benzoate is a common chemical used in multiple consumer products – solvents, insecticides, perfumes, etc.").

The home is a common repository for methyl benzoate-containing perfumes and cleansing products that rely on methyl benzoate to mask the cleansers' chemical odor. *See, e.g.*, U.S. Patent No. 6,572,847 B2 (filed Mar. 26, 2001) (noting that methyl benzoate is a commonly used "odorant," meaning that it is a fragrance added as an "odor mask" in commercially available products). Yet, no scientific studies consider whether ordinary households sources of methyl benzoate could induce a positive canine alert. The

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2011) (expert testifying that some perfumes and personal-use products contain methyl benzoate in small amounts, but that the amounts in these products are below a detection dog's threshold for methyl benzoate detection). Notwithstanding, there is no published scientific research that uses the amount of methyl benzoate in an entire bottle of perfume as a research variable (perhaps because the amount of methyl benzoate in any given perfume is protected proprietary information) in determining whether these more substantial amounts of methyl benzoate could produce a positive drug-detection alert.

studies that do exist are "interference studies" that consider whether household items like rosemary, oregano, sesame seeds, and black pepper can *mask* illegal drugs from canine detection. *See, e.g.,* Hanh Lai, et al., *Headspace sampling and detection of cocaine, MDMA, and marijuana via volatile markers in the presence of potential interferences by solid phase microextraction-ion mobility spectrometry (SPME-IMS)*, 392 Analytical and Bioanalytical Chemistry 105, 107 (2008). Studies that examine whether household items are capable of producing a false-*negative* canine sniff add nothing to the discussion of whether other household items might produce a false positive. Therefore, interference studies are simply inapposite to the question of whether detection dogs are capable of alerting to lawful methyl-benzoate sources found in the ordinary home.

ii. Heroin and Acetic Acid

Vinegar. Aspirin. Food additives. Wart removers. "Green" or "Earth-friendly" household cleaning supplies. Heroin. Common to all of these items is acetic acid.

Studies show that acetic acid is the dominant odor signature of heroin and is the organic compound to which drug-detection dogs alert. *See* Michael Macias, *The Development of an Optimized System of Narcotic and Explosive Contraband Mimics for Calibration and Training of Biological Detectors*, 104 (May 27, 2009) (Florida Int'l Univ. Electronic Theses

and Dissertations, Paper 123), *available at* http://digitalcommons.fiu.edu/123 (last visited June 16, 2012) (discussing the odor profiles of drugs and commercially available drug-mimic scents); *see also* James E. Girard, Criminalistics: Forensic Science, Crime, and Terrorism 277 (Jones & Bartlett Learning, 2d ed. 2011) ("Acetic acid is the major organic component of vinegar. For this reason, drug-sniffing dogs are trained to recognize the vinegar-like odor that may still be present in clandestine shipments of poorly purified heroin.").

The problem for heroin detection is that acetic acid is commonly found in ordinary household items; it is, for example, the constituent of vinegar that gives it its characteristic odor. *See* Macias, *Development of an Optimized System*, *supra*, at 104-09 (graphing the concentration of acetic acid in balsamic vinegar, red wine, apple cider, and white distilled vinegar). The same odor that is produced by the "deacetylation process of heroin to morphine" – acetic acid – is also produced in vinegar as "a direct result of the fermentation process . . . of ethyl alcohol with ethyl acetate." *Id.* at 104. One scent is produced in either case – with two very different origins.

While an opened bottle of vinegar is probably not routinely transported in luggage or vehicles (the bottle presumably remains sealed on the drive home from the grocery store), it goes without saying that vinegar is routinely used in the home, perhaps increasingly so. In an era when people are concerned about the environment as well as exposing their

children to chemical cleansing products, it is not just the old-fashioned who clean their homes' floors and windows with vinegar and vinegar-based products. *Cf.* Mary G. Lankford, et al., *Assessment of materials commonly utilized in health care: Implications for bacterial survival and transmission*, 34 Am. J. Infection Control 258, 260 (2006) (comparing effectiveness of a variety of disinfectants, including "distilled, white vinegar").

Significantly, however, there are no scientific data, or even anecdotal discussions in judicial cases or scientific literature, that reassure that drug-detection dogs can differentiate between the acetic acid sources commonly found in the home and heroin. In fact, based on the similarity between heroin and vinegar (i.e., acetic acid) the limited research available raises the concern of detection-dog confusion in drug-detection dogs trained with single-ingredient pseudo heroin (in which acetic acid is the sole volatile ingredient). *See* Macias, *Development of an Optimized System*, *supra*, at 104 (noting that because "[t]raining compounds need to be representative of the actual sample of interest (i.e. heroin) and distinguishable from common, everyday items (i.e. vinegar) . . . , the use of acetic acid as a single training compound may not be sufficient.").

Nevertheless, acetic acid has been used for years in pseudo drug training aids to train detection dogs to alert to heroin or to reinforce their heroin-detection field training, *cf. id.* at 112, Table 21. In fact, acetic acid may be the *sole* volatile compound in some

"pseudo heroin" training aids. *Id.*; *see also* Dowell, *supra*, at 1.[15] Therefore, there is no way to know whether the drug-detection dog sniffing at a front door has done no more than discover that it was housekeeping day for the lady (or gentleman) of the house without physical entry to identify the acetic acid source.

In addition to vinegar, many routine over-the-counter medications, such as aspirin, break down to produce acetic acid. *See* T.P. Wampler, et al., *Dynamic headspace analyses of residual volatiles in pharmaceuticals*, 23 J. of Chromatographic Sci. 64 ("Acetylsalicylic acid (aspirin) degrades to produce acetic acid, thus causing a vinegary smell in samples which are either past their prime or which have been improperly stored."). The home is, of course, an appropriate place for people to store their medications, both prescription and over-the-counter. People should not be left to wonder whether improperly stored medications or even pills that have been kept too long might provoke a drug-detection dog's alert.

iii. Canine Detection of Other Illegal Drugs

MDMA: Because of the rise in use of MDMA, also known as "Ecstasy," drug-detection dogs are now

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[15] Based upon Custom's list of ingredients used in its various "pseudo drug" training aids, *see* Dowell, *supra*, at 1, it appears that acetic acid is the sole *volatile* substance in Customs's pseudo heroin. *Cf. id.* at 1-3. *See also* note 12, *supra*.

being certified to detect MDMA. *See* Lorenzo, *supra*, at 1213. Yet just as drug-detection dogs smell methyl benzoate instead of cocaine, drug-detection dogs alert to the volatile molecule, piperonal, rather than MDMA. *See* Michael Macias, et al., *Availability of Target Odor Compounds from Seized Ecstasy Tablets for Canine Detection*, 56 J. Forensic Sci. 1594, 1597 (2011) (explaining that drug-detection dogs trained to alert to Ecstasy are reacting to piperonal). As with cocaine and heroin, Customs prepares a pseudo drug training aid for detection of MDMA, which trains drug-detection dogs to alert to piperonal, not MDMA itself. *See* Dowell, *supra*, at 1-3.

Yet piperonal appears in a wide array of ordinary household products, like (1) soap, *see* Sigeru Torii, et al., *An electrochemical procedure for a practical preparation of piperonal from isosafrole*, 49 J. Org. Chem. 1830, 1830 (1984); (2) food additives and flavor enhancers, *see* J. Enrique Cometto-Muniz, *Odor, taste and flavor perception of some flavoring agents*, 6 Chemical Senses 215 (1981); and (3) even lice repellents, *see* Susan Peock & J.W. Maunder, *Arena Tests with Piperonal, A New Louse Repellent*, 113 J. Royal Soc. Health 292, 294 (1993). Because the odor of piperonal is also produced by ordinary household items, a drug-detection dog that is trained to alert to piperonal is capable of revealing lawful activity within the home. *See Caballes*, 453 U.S. at 409-10.

Marijuana: It should come as no surprise that there is a wealth of information on the internet about marijuana, including non-scientific discussions about

marijuana detection (with the focus being on ways to avoid it). From a legitimate research perspective, however, while "interference" studies exist there is otherwise no empirical data on canine marijuana detection and the related issue of whether "smell-alike" plants exist that could produce a positive canine alert. Nevertheless, anecdotal reports documented by legitimate media sources suggest that a drug-detection dog's alert to the presence of marijuana in a home is "capable" of revealing lawful activities. *See Caballes*, 543 U.S. at 409-10.

In Britain, a pink flowering plant, called moss phlox, when grown in suburban gardens has produced positive canine drug-detection alerts and police raids on homes. *See Pensioners' fragrant garden plants spark police drugs raid*, Irish Exam'r, Dec. 6, 2008 ("Police have apologised to Ivor Wiltshire, 77, and his wife Margaret, 79, for raiding their home with sniffer dogs to search for a cannabis factory in the loft. After finding no evidence of illegal activity the culprit is thought to be a seemingly harmless garden plant which grows small pink flowers known as moss phlox or phlox subulata."); *see also* Kathleen Faulkner, *Police Raid on Middle-Class Couple Who Grew a Plant that Smelled Exactly like Cannabis*, Daily Mail, Dec. 27, 2011 ("Police swooped on the Vincent's home after a drug dog went berserk at the smell. A neighbor said: 'Drug cops were crawling up and down the alleyway that borders their house. . . . A sniffer dog was there too, barking whenever it got close to their garden.").

Anecdotal reports are, of course, not science, but the legitimacy of the canine-sniff technique has long depended on anecdotal data. News reports are just more of the same. Regardless of the overall reliability of the canine-sniff technique for detection of marijuana, if smell-alike garden plants can induce a positive canine alert, then a canine home-sniff is capable of revealing lawful activity. *See Caballes*, 543 U.S. at 409-10. Without research, there is no way to know whether the drug-detection dog sniffing at the home has discovered that the lady (or gentleman) of the house enjoys gardening – of the entirely lawful sort – without physical entry to rule out a smell-alike plant.

iv. The Accuracy of Canine Home-Sniffs Cannot Be Assumed by Extrapolation From the Close-Proximity Sniffs of Luggage and Vehicles

Law enforcement claims that drug-detection dogs can reliably detect contraband in luggage and vehicles should not be used as a basis for assuming the reliability of canine home-sniffs. Differences between close-proximity sniffing and home-sniffs suggest caution in assuming that all canine drug-detection sniffs are one and the same. For home-sniffs, the drug-detection dog cannot obtain the same proximity to the volatile substance's source as would typically be the case for luggage and vehicle-sniffs. *Cf.* Gary S. Settles, et al., *The External Aerodynamics of Canine Olfaction, in* Sensors and Sensing in Biology and Engineering 323, 327 (Friedrich G. Barth et al. eds.,

2003) (describing "marked[ ]" differences in the mechanics of distance sniffing – calling it a "long sniff" – and close-proximity sniffing, where the dog is given "free investigation of the scent"). From a practical perspective, in order to determine whether canine drug-detection sniffs of the home can be reliable, we need scientific research – research that considers whether canine sniffs of ordinary homes (that are not secreting contraband) can produce false-positive canine alerts, not simply another "interference" study that examines whether "masking" strategies can trick drug-detection dogs into false-*negatives*.

Additionally, home occupants generally have less control over the people who access their front doors and associated curtilage areas than they do personal items like luggage. If the State's residual odor argument in *Harris* is correct, *see Harris* Pet. at 18, there is a real risk that a drug-detection dog could alert to contraband waste molecules[16] left behind by others –

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[16] Contraband waste molecules have the potential to contaminate surfaces associated with the front door of a residence. For instance, the U.S. Department of Justice has explained:

> [P]articulate contamination is easily transferred from one surface to another, so a person who has handled cocaine will transfer cocaine particles to anything else he or she touches, including skin, clothing, *door handles*, furniture, and personal belongings. Completely removing particular contamination from an object requires rigorous cleaning, and, in the case of bare hands, a single thorough washing may not be sufficient to remove all particles.

Nat'l Inst. of Justice, U.S. Dep't of Justice, Guide for the Selection of Drug Detectors for Law Enforcement Applications: NIJ

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even a marijuana seed dropped from a visitor's pocket onto the doormat.[17] Based upon the lack of control over the front-door location of the canine sniff along with situational impediments that may impact a home-sniff's reliability, canine sniffs of the home are different from close-proximity sniffs and should not be treated the same way.

CONCLUSION

Drug-detection dogs do not alert to the "odor of contraband"; instead, they alert to the odors for which they were trained to detect. As scientific research establishes, drug-detection dogs are trained to alert to odors that are not unique to contraband. These odors are also produced by lawful items found in the ordinary home. Because a detection-dog's sniff at the front door of a private residence is capable of revealing lawful activity inside, it is therefore a search under the Fourth Amendment.

Guide 601-00, at 6 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/183260.pdf (emphasis added).

[17] *Cf. Fla. Dep't of Highway Safety & Motor Vehicles v. Jones*, 780 So. 2d 949, 950 (Fla. Dist. Ct. App. 2001) (discussing a drug-detection dog's alert to marijuana "residue" consisting of stems and seeds of an estimated weight of less than one gram, which the Florida State Trooper testified was too small in amount to recover because "[i]t was embedded in the carpet and would have taken tweezers to recover") (internal quotation marks omitted).

For the reasons stated above, the Florida Supreme Court's decision must be affirmed.

Respectfully submitted,

LESLIE A. SHOEBOTHAM
Associate Professor of Law
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS
COLLEGE OF LAW
7214 St. Charles Ave.
New Orleans, LA 70118
(504) 861-5683
shoeboth@loyno.edu

APPENDIX
LIST OF *AMICI CURIAE*

Leslie W. Abramson
Frost Brown Todd Professor of Law
Louis D. Brandeis School of Law
University of Louisville

Derek M. Alphran
Associate Professor of Law
University of the District of Columbia
David A. Clarke School of Law

Andrea Armstrong
Assistant Professor of Law
Loyola University New Orleans College of Law

Shawn Marie Boyne, J.D., Ph.D.
Associate Professor of Law
Indiana University
Robert H. McKinney School of Law

Jenny E. Carroll
Associate Professor of Law
Seton Hall University Law School

Luis E. Chiesa
Associate Professor of Law
Pace Law School

Frank Rudy Cooper
Professor of Law
Suffolk University Law School

LaJuana Davis
Associate Professor of Law
Cumberland School of Law

A. Kimberley Dayton
Professor of Law
Director, Center for Elderly Justice and Policy
William Mitchell College of Law

J. Amy Dillard
Associate Professor of Law
University of Baltimore School of Law

Dolores A. Donovan
Professor of Law
Director, USF Center for Law and Global Justice
University of San Francisco School of Law

Steven B. Duke
Professor of Law
Yale Law School

Todd D. Fernow
Professor of Law
Director of the Criminal Law Clinic
University of Connecticut School of Law

Brian J. Foley
Associate Professor of Law
Florida Coastal School of Law

Russell C. Gabriel
Director, Criminal Defense Clinic
University of Georgia School of Law

Brian R. Gallini
Associate Professor of Law
University of Arkansas School of Law – Fayetteville

Michelle Ward Ghetti
LOCHE Endowed Professor of Law
Southern University Law Center

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Associate Professor of Law
University of Dayton

Andrew Horwitz
Professor of Law
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Roger Williams University School of Law

Russell L. Jones
Vice Chancellor for Academic Affairs
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Southern University Law Center

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St. Mary's University School of Law

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Capital University Law School

Alex Kreit
Associate Professor of Law
Director, Center for Law and Social Justice
Thomas Jefferson School of Law

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Professor of Law
St. Thomas University

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Professor of Law
Oklahoma City University School of Law

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University of San Francisco School of Law

Caleb Mason
Associate Professor of Law
Southwestern Law School

Lynn McDowell
Professor of Professional Skills and
Director of Clinical Programs
Florida Coastal School of Law

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Professor *Emeritus*, UCLA Law School
and Professor of Law, Seattle University

Michael Meltsner
Matthews Distinguished University Professor of Law
Northeastern University School of Law

Michael Millemann
Jacob A. France Professor of Public Interest Law
Director, Leadership, Ethics & Democracy Initiative
University of Maryland
Francis King Cary School of Law

Colin Miller
Associate Professor of Law
The John Marshall Law School

Kenneth B. Nunn
Professor of Law
University of Florida Levin College of Law

Michael P. O'Connor
Professor of Law
Phoenix School of Law

Timothy P. O'Neill
Professor of Law
The John Marshall Law School

Albert T. Quick
Professor of Law and Dean *Emeritus*
University of Toledo College of Law

William P. Quigley
Professor of Law
Director of the Loyola Law Clinic and the Gillis Long
Poverty Law Center
Loyola University New Orleans College of Law

Sadiq Reza
Professor of Law
New York Law School

Ira P. Robbins
Barnard T. Welsh Scholar and
Professor of Law and Justice
American University, Washington College of Law

Amy D. Ronner
Professor of Law
St. Thomas University School of Law

Celia Rumann
Professor of Law
Phoenix School of Law

Laurent Sacharoff
Assistant Professor of Law
University of Arkansas School of Law – Fayetteville

Omar Saleem
Professor of Law
Florida A&M University College of Law

Andrew E. Taslitz
Professor of Law
American University, Washington College of Law

Basyle J. Tchividjian
Assistant Professor of Law
Liberty University School of Law

Sandra Guerra Thompson
UH Law Foundation Professor of Law
and Criminal Justice Institute Director
University of Houston Law Center

James Etienne Viator
Adams & Reese Distinguished Professor of Law
Loyola University New Orleans College of Law

Byron L. Warnken
Associate Professor of Law
University of Baltimore School of Law
2012-13 Chair, Criminal Law & Practice Section,
Maryland State Bar Association
2012 Recipient of Maryland's Lifetime Achievement
Award in Criminal Law

Shandrea P. Williams
Assistant Professor of Law
Phoenix School of Law

David M. Zlotnick
Professor of Law
Roger Williams University School of Law

AMICUS CURIAE BRIEF

No. 11-564

IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

JONATHAN D. HACKER
CO-CHAIR, SUPREME COURT
AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

NORMAN L. REIMER
MASON C. CLUTTER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L Street, N.W., 12th Floor
Washington, D.C. 20036
(202) 465-7658

DANIELLE SPINELLI
Counsel of Record
ANNIE L. OWENS
MADHU CHUGH
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

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INTEREST OF AMICI CURIAE[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, professional bar association representing public defenders and private criminal defense lawyers across the nation. Founded in 1958, NACDL has a direct national membership of more than 10,000 attorneys and more than 28,000 affiliate members from all fifty states.

Amicus curiae the Florida Association of Criminal Defense Lawyers ("FACDL") is NACDL's Florida affiliate, comprising more than 1,700 members. FACDL is the only statewide organization in Florida dedicated to the criminal defense attorney.

Amici's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice and the defense of individual liberties. Most significantly for purposes of this case, amici have a strong interest in ensuring that the Fourth Amendment remains a robust protection against unreasonable encroachments on individual privacy.

Amici submit this brief not to repeat respondent's arguments, but to offer an alternative analysis. Specifically, amici urge this Court to recognize that law enforcement's use of dogs to discover the otherwise private attributes of our "persons, houses, papers, and ef-

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[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

fects" is not wholly outside the scope of the Fourth Amendment; that dogs are not binary "contraband detectors" that reveal only the presence or absence of illegal drugs; and that, because it reveals intimate details of the home, a dog sniff of a house is a search within the meaning of the Fourth Amendment. Once dog sniffs are recognized as searches, this Court can directly address the central question the Fourth Amendment poses: whether such a search is "unreasonable" in light of the place being searched, the intrusiveness of the search, and the law-enforcement objective the search serves. The answer to that question may differ in circumstances different than those present here—such as sniffs of vehicles or luggage following a valid Fourth Amendment seizure. But the original understanding of the Fourth Amendment and this Court's precedent make plain that suspicionless prying into the home to ascertain what is concealed there, by any means, is unconstitutional.

SUMMARY OF ARGUMENT

This case presents the question whether law enforcement's use of a narcotics-detection dog to sniff a house, in order to discover whether the house contains evidence of wrongdoing that would otherwise remain concealed, is a "search" within the meaning of the Fourth Amendment. As demonstrated below, the answer is yes.

The State's (and its amici's) contrary argument is simple: A dog sniff, it contends, can reveal only the presence or absence of illegal drugs. Because, it posits, no one has a legitimate privacy interest in contraband, a dog sniff invades no legitimate privacy interest and thus is not a search. In fact, according to the State, the Fourth Amendment simply says nothing whatever

about the use of dogs to discover what is otherwise concealed. And it makes no difference, the State claims, whether law enforcement is using the dog to obtain information about the interior of luggage, of an automobile, or of a home: There is no privacy interest at stake and no search, period.

That argument rests on a mistaken premise. Dogs are not binary contraband detectors that indicate only the presence of illegal drugs or their absence. Indeed, dogs often do not detect contraband, *per se*, at all. Rather, a dog generally detects chemicals that may be present in either licit or illicit substances. Like the thermal imager in *Kyllo* v. *United States*, 533 U.S. 27 (2001), a dog sniff thus reveals details about the interior of the home beyond the mere presence or absence of contraband. And because "[i]n the home, ... *all* details are intimate details," *id.* at 37, a suspicionless dog sniff of a house violates the privacy right at the heart of the Fourth Amendment.

The State also fails to recognize the special status of the home under the Fourth Amendment. As this Court has repeatedly recognized, "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" is "[a]t the very core" of that Amendment. *Silverman* v. *United States*, 365 U.S. 505, 511 (1961); *see also Kyllo*, 533 U.S. at 31. Intrusions that might be reasonable in another context may thus offend the Fourth Amendment when directed at a home.

The State would have this Court treat all law-enforcement use of dogs as beyond the Fourth Amendment's scope. An approach more faithful to the text and purpose of the Fourth Amendment, and more consistent with what we know about narcotics-detection

dogs, would recognize that dog sniffs *can* intrude on protected privacy interests and proceed to analyze whether such an intrusion is "unreasonable." Unlike the previous cases in which this Court has addressed dog sniffs, here a dog was used to obtain private information about the interior of a home, an area "held safe from prying government eyes." *Kyllo*, 533 U.S. at 37. Absent exigent circumstances, such a suspicionless search of the home is inherently unreasonable.

Finally, permitting suspicionless dog sniffs of the home is likely to lead to serious encroachments on Fourth Amendment protections over time. The government has developed various methods of prying into a house without effecting physical entry. A dog sniff is one of them. Placing such information-gathering techniques outside the Fourth Amendment's scope permits the government to "shrink the realm of guaranteed privacy," *Kyllo*, 533 U.S. at 34, without any judicial check at all. And allowing suspicionless dog sniffs of houses would permit indiscriminate sweeps of residential neighborhoods, a practice that some law-enforcement officials have already begun to employ.

ARGUMENT

I. A Dog Sniff Of The Home Is A Fourth Amendment Search

A. This Court Has Long Recognized A Heightened Expectation Of Privacy In The Home

Since the Founding, "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" has stood at "the very core" of the Fourth Amendment. *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (internal quotation marks omitted). It has been "understood since the beginnings of the

Republic" that "privacy and security in the home are central to the Fourth Amendment's guarantees." *Hudson* v. *Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment); *see also Wilson* v. *Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home[.]"); *Payton* v. *New York*, 445 U.S. 573, 601 (1980) (recognizing the Court's "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"). In short, "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

Repetition can make such statements sound like pious platitudes. But they merely acknowledge our homes' central role in our physical, social, and emotional existence. Houses provide shelter not only from the elements but also from other people, except for those we invite in. They are the spaces in which our private lives take place. And they enable us to escape the government surveillance that is increasingly common outside the home. As the Founders recognized, we reasonably expect that anything inside the home and shielded from public view is presumptively immune from government scrutiny. For those reasons, "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

Put another way, the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S. at 590—a line that "must be not only firm but also bright," *Kyllo*, 533 U.S. at 40. Accordingly, while "physical entry of the home is the chief evil against

which ... the Fourth Amendment is directed," *Payton*, 445 U.S. at 585 (internal quotation marks omitted), this Court has not permitted the government to evade the Fourth Amendment's protections by intrusions into the home that do not require physical entry. Although observing items in plain view from a public location is not a search, when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40. That rule is necessary to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 34.

Thus, in *Kyllo*, this Court held that the warrantless use of a thermal-imaging device to detect heat emanating from a home was an unlawful search. That was true even though the device did not physically penetrate the house or reveal any detail more specific than the amount of heat escaping from the house. 533 U.S. at 34-36. And it was true even though, arguably, "no 'significant' compromise of the homeowner's privacy ha[d] occurred," *id.* at 40, because in the home, "*all* details are intimate details," *id.* at 37; *see also id.* at 38.

Similarly, in *United States* v. *Karo*, 468 U.S. 705, 714 (1984), this Court held that warrantless monitoring of a beeper in a can of ether in a private residence was an unlawful search because it revealed information about the home not otherwise obtainable without entering the home. Acknowledging that the "monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search," the Court emphasized that such monitoring is nonetheless a Fourth Amendment search because it "reveal[s] a critical fact

about the interior of the premises that the Government is extremely interested in knowing." *Id.* at 715. And such "[s]earches ... inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *Id.* at 714-715.

Underscoring the special status of homes under the Fourth Amendment, this Court has acknowledged that non-physical intrusions that may be reasonable in contexts outside the home can be unreasonable searches, and thus can violate the Fourth Amendment, when directed at the home. For instance, although this Court held in *Karo* that using a beeper to trace a container of ether to a private residence violated the Fourth Amendment, it also held that using the same beeper to locate the ether at a commercial warehouse was not an "illegal search" because the same expectation of privacy did not attach. 468 U.S. at 721.

The Court in *Karo* also distinguished *United States* v. *Knotts*, 460 U.S. 276 (1983), which held that the use of a beeper to monitor a drum of chloroform in an automobile was not a Fourth Amendment search. Explaining that "[o]ne has a lesser expectation of privacy in a motor vehicle," *Knotts* held that no Fourth Amendment violation occurred because the monitoring of the beeper "amounted principally to the following of an automobile on public streets and highways." *Id.* at 281 (internal quotation marks omitted). And although the chloroform came to rest outside a cabin, "there [was] no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin." *Id.* at 285. The Court reasoned that while "the owner of the cabin and surrounding premises ... undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was

concerned[,] ... no such expectation of privacy extended to the visual observation" of the automobile. *Id.* at 282.

This Court drew a similar distinction in *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 236-237 (1986), holding that using a powerful camera to take aerial photos of a large, "elaborately secured" industrial complex was not a Fourth Amendment search. Citing the diminished expectation of privacy in commercial property, *id.* at 237-238, this Court found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," *id.* at 237 n.4.

Jardines, then, had a greater expectation of privacy than the defendants in this Court's previous dog-sniff cases, which involved property seized in public places that "do[] not share the Fourth Amendment sanctity of the home." *Kyllo*, 533 U.S. at 37; *see Illinois* v. *Caballes*, 543 U.S. 405, 408 (2005) (sniff of vehicle during traffic stop); *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 40 (2000) (sniff of vehicles at roadway checkpoint); *United States* v. *Place*, 462 U.S. 696, 707 (1983) (sniff of luggage in airport). The dog sniff here was intended to, and did, discover otherwise private information about the inside of Jardines's home—a place that, above all others, the Fourth Amendment guards against governmental intrusion.

B. Dog Sniffs Can Reveal More Than The Mere Presence Or Absence Of Contraband

The dog sniff in this case not only was directed at Jardines's home, where privacy interests are strongest, but also was capable of detecting intimate details of the home. It was thus the same kind of non-physical intrusion into the home that *Kyllo* and *Karo* held is barred

by the Fourth Amendment absent a warrant supported by probable cause.

1. To support their contrary argument, the State and the United States rely on this Court's statement in *Caballes* that "governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest." 543 U.S. at 408.[2] This reasoning depends on a critical factual premise: that the nar-

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[2] Although amici do not challenge that reasoning here, it is in considerable tension with this Court's previous Fourth Amendment jurisprudence. The privacy interest at stake in cases like this one is not an interest in hiding the possession of contraband, but an interest in shielding the private interior of the home, whatever it contains, absent probable cause for a search. The notion that the Fourth Amendment is not implicated by "governmental conduct that only reveals the possession of contraband" runs counter to the established principle that "[t]he protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent." *Agnello* v. *United States*, 269 U.S. 20, 32 (1925). Likewise, "[t]hose suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses." *Karo*, 468 U.S. at 717. And a warrantless search that reveals evidence of a crime—including contraband drugs—does not thereby become constitutional. *See, e.g.*, *Kyllo*, 533 U.S. at 40; *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948) (fact that officers found illegal gambling operation in home did not absolve officers from obligation to obtain a search warrant before entering the home); *see also Henry* v. *United States*, 361 U.S. 98, 104 (1959) (arrest without probable cause "is not justified by what the subsequent search discloses," even where it discloses contraband). A police officer who opened a private locker, say, without suspicion of wrongdoing and found *only* contraband inside would not be able to claim that his actions were proper. As this Court has recognized, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona* v. *Hicks*, 480 U.S. 321, 329 (1987).

cotics-detection dog reveals the presence or absence of contraband and nothing else. *Place*, 462 U.S. at 707. But that premise—the accuracy of which this Court has never squarely addressed—is wrong.

This Court first addressed dog sniffs in *Place*, in which police seized and detained a traveler's luggage at an airport, based on reasonable suspicion that it contained illegal drugs, so that it could be sniffed by a narcotics-detection dog. 462 U.S. at 697-698. The Court invalidated the seizure on the ground that the detention was too lengthy to be justified on reasonable suspicion alone. *Id.* at 709. The Court addressed the dog sniff in dicta, even though the issue had not been raised by the parties, noting that the dog sniff "is much less intrusive than a typical search" and "discloses only the presence or absence of narcotics, a contraband item." *Id.* at 707. For those reasons, the Court concluded that "the canine sniff is *sui generis*" and that it was not a search under the Fourth Amendment. *Id.*

Similarly, in *Edmond*, this Court invalidated a highway checkpoint using narcotics-detection dogs to sniff cars, on the ground that finding illegal drugs was insufficient justification for suspicionless seizures. In dicta, the Court again stated that the dog sniff did not "transform the seizure into a search" because it was "not designed to disclose any information other than the presence or absence of narcotics." 531 U.S. at 40.

Finally, in *Caballes*, this Court held that reasonable suspicion was not required for a dog sniff of a car that had been lawfully seized. Noting that Caballes had conceded that properly conducted dog sniffs are likely to reveal only the presence of contraband, and that he did not suggest that even erroneous dog sniffs revealed any private information, the Court concluded that "the

use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." 543 U.S. at 409 (citation omitted).[3]

The question whether dog sniffs truly reveal only the presence or absence of contraband was not squarely joined in any of the three cases. *Place* and *Edmond* addressed the issue only in dicta, and *Caballes* indicated that the issue was not meaningfully contested. This case thus provides an appropriate opportunity for this Court to consider the question.

2. The State's and its amici's primary argument turns on the premise that "a dog sniff reveals only the fact that contraband is present." Pet. Br. 11. But it offers no evidence whatever to support that claim. In fact, studies show that narcotics-detection dogs—even "well-trained" dogs—are not binary contraband detectors. Empirical evidence from real-world settings indicates that a high proportion of dog alerts to illegal narcotics are false alerts, prompted by some factor *other* than the actual presence of the contraband purportedly detected. *See, e.g.*, NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, at 29-30

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[3] The State and United States also rely on *United States* v. *Jacobsen*, 466 U.S. 109 (1984). But *Jacobsen* addressed an entirely different question: whether it is a "search" to test a substance rightfully in the government's possession to determine whether it is cocaine. As described in *Jacobsen*, such a test truly is binary, revealing only whether the substance is cocaine or something other than cocaine. *Id.* at 122. Moreover, investigating a substance lawfully in the government's possession cannot be compared to prying into the otherwise concealed and private interior of a home.

& fig. 5 (2006) (approximately 74% of 10,211 alerts were false alerts);[4] Hinkel & Mahr, *Drug-sniffing dogs in traffic stops often wrong*, Chi. Trib., Jan. 26, 2011, at C1 (approximately 56% of alerts from 2007 to 2009 for several suburban police departments were false alerts); *Merrett* v. *Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) (approximately 96% of 28 alerts were false alerts); *Doe ex rel. Doe* v. *Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979) (approximately 66% of 50 alerts were false alerts). Such false alerts frequently arise because narcotics-detection dogs can, and often do, alert to the presence of substances other than the contraband they were purportedly trained to detect. In other words, when a narcotics-detection dog alerts, there is a substantial probability that it reveals not the presence of contraband, but rather information about *legitimate* items or activity.[5]

Such false alerts can reveal legitimate private information about the home because dogs often identify narcotics by detecting the scent of a "contaminant or by-product in the drug" whose odor is more easily perceived than that of the pure form of the drug itself. Lunney, *Has the Fourth Amendment Gone to the Dogs?*, 88 Or. L. Rev. 829, 838 (2009). Indeed, "detection dogs may not be able to detect the so-called ultrapure forms of drugs, such as cocaine and heroin, because of the extremely low vapor pressure of the un-

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[4] *Available at* http://www.ombo.nsw.gov.au/publication/PDF/other%20reports/ReviewPolicePowers_DrugDetectionDogs_Jun06.pdf.

[5] The evidence regarding the high likelihood of false alerts by narcotics-detection dogs and the causes of those false alerts is described more fully in amici's brief in *Florida* v. *Harris*, No. 11-817.

adulterated drug." *Id.* Instead, "studies with narcotics detector dogs have shown that dogs alert to volatile odor chemicals *associated with* drugs rather [than] the parent drug itself." Lorenzo et al., *Laboratory and Field Experiments Used to Identify* Canis lupus *var.* familiaris *Active Odor Signature Chemicals from Drugs, Explosives, and Humans*, 376 Analytical & Bioanalytical Chemistry 1212, 1213 (2003) (emphasis added).

Accordingly, dogs trained to detect drugs like cocaine, heroin, and ecstasy may also alert to a host of household items that contain the same "signature" odors, even when no illegal narcotics are present. For example, field studies have shown that "drug detector dogs alert to the common volatile cocaine byproduct methyl benzoate rather than to ... cocaine itself." Furton et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction—Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147, 155 (2002). Methyl benzoate is "the dominant odor chemical signature for cocaine." Macias et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab. 16, 16 (2008). Although methyl benzoate is frequently found in street cocaine, it is not contraband. Indeed, the FDA has approved its use as a synthetic flavoring substance, and it can be found in a number of common household items, including perfume, solvents, and insecticide. Lunney, *supra*, at 838-839. Methyl benzoate alone can prompt an alert by a narcotics-detection dog, even

when no cocaine or other contraband is present.[6] Furton et al., *supra*, at 153 tbl. IV; *see also id.* at 154-155 (explaining that dogs failed to alert to pharmaceutical-grade cocaine, which has minimal levels of methyl benzoate).

Similarly, acetic acid, the "dominant odor compound in heroin samples," may prompt dogs to alert to foods and prescription drugs. Macias et al., *supra*, at 16. Acetic acid is the primary ingredient in vinegar; it is also used in pickles and some glues. Katz & Golembiewski, *Curbing the Dog*, 85 Neb. L. Rev. 735, 755 (2007). Prescription drugs can also give off the odor of acetic acid through the process of hydrolysis when exposed to air. *Id.*

Piperonal, the "dominant odor used by" detection dogs in alerting to the drug MDMA, also known as ecstasy, can also lead to false alerts. Lorenzo, *supra*, at 1223. Piperonal is a "[f]lavouring agent in cherry and vanilla flavours" and is used in perfume and mosquito repellent. United Nations Office on Drugs and Crime, Regional Office for South Asia, *Precursor Control at a Glance* 19 (2006).[7] Experiments show that narcotics-detection dogs will readily alert to samples of piperonal that do not contain MDMA or other illegal narcotics. Lorenzo, *supra*, at 1220 tbl. 3.

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[6] For example, a detection dog appears to have alerted to methyl benzoate in a bottle of perfume in a student's purse in *Horton ex rel. Horton* v. *Goose Creek Independent School District*, 690 F.2d 470, 474 (5th Cir. 1982).

[7] *Available at* http://www.unodc.org/documents/southasia//reports/Precusor_Control_at_a_Glance.pdf.

These findings contradict the assumption that narcotics-detection dogs are binary contraband detectors. An alert by a narcotics-detection dog can reveal, among other things, that the homeowners possess perfume, vinegar, insecticide, pickles, or other household items. By disclosing information about these licit items in the home, a dog alert can reveal information entirely unrelated to the presence of contraband.

As discussed above, this Court has made clear that any police activity revealing details of the home that could not otherwise be known absent physical intrusion is a search under the Fourth Amendment. *See Kyllo*, 533 U.S. at 40; *Karo*, 468 U.S. at 715. Accordingly, because dog sniffs reveal more details about the home than the mere presence or absence of contraband, they are not exempt from the strictures of the Fourth Amendment.

3. The State's and its amici's remaining arguments fare no better. First, the United States contends (at 16 n.4) that a narcotics-detection dog's erroneous alert reveals no legitimate private information because "it means only that the dog has communicated wrong information about contraband." That is simply not so. While multiple factors could result in an erroneous alert, one common reason for an erroneous alert, as described above, is that the dog has detected the odor of a legal substance—such as the lady of the house's perfume, *cf. Kyllo*, 533 U.S. at 38. Such an alert reveals details of the interior of a home unknowable by other means, absent physical entry. That is precisely what the Fourth Amendment guards against.

Of course, a dog cannot communicate to its handler whether it has detected cocaine or perfume; at most, the handler will learn from an alert that one of many

items, some legitimate and some contraband, may be present. But "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S. at 37. Indeed, the thermal imager whose use was held a search in *Kyllo* was a "crude" technology that revealed only "the relative heat of various rooms in the home." *Id.* at 35 n.2, 36. But it was immaterial whether this information was "particularly private or important"; use of the thermal imager was an intrusion barred by the Fourth Amendment because it revealed "information regarding the interior of the home." *Id.* at 35 n.2; *see also Karo*, 468 U.S. at 715 (use of beeper to determine that container of ether was inside home was Fourth Amendment search); *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987) ("It matters not that the search uncover[s] nothing of great personal value .... A search is a search, even if it happens to disclose nothing but the bottom of a turntable.").

Likewise, here, the dog sniff may reveal only the potential presence of certain chemicals within the home. But if the relative warmth of various rooms in a home, the presence of ether in a home, and the serial numbers on the bottom of a turntable inside a home are protected by the Fourth Amendment—and they are—so is the information revealed by the dog sniff. Such details regarding the interior of the home are by definition "intimate details" subject to Fourth Amendment protection "because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37.

Similarly, the United States contends (at 27) that the dog sniff in this case did not violate the Fourth Amendment because the Florida Supreme Court "did not find that the dog detected any substance other than contraband narcotics." But it is irrelevant that some

fraction of detection dogs' alerts will accurately detect illegal narcotics. "[N]o police officer would be able to know *in advance* whether" a dog sniff "picks up 'intimate' details"—in which there is undoubtedly a reasonable expectation of privacy—or contraband, and an officer "thus would be unable to know in advance whether [a particular dog sniff] is constitutional." *Kyllo*, 533 U.S. at 39. As this Court held in *Kyllo*, an analysis that turned on whether the particular intrusion *in fact* disclosed intimate details of the home would be both "wrong in principle" and "impractical in application." *Id.* at 38. For the same reasons, this Court in *Karo* rejected the government's contention that no warrant should be required because officers had "no way of knowing in advance whether the beeper will be transmitting its signals from inside private premises." 468 U.S. at 718. This Court recognized that the mere possibility that the beeper could be used to locate an object in a home was sufficient to counsel against "deviating from the general rule that a search of a house should be conducted pursuant to a warrant." *Id.* Likewise, in this case, because the government could not know whether the dog sniff would reveal intimate details about the home rather than the presence of contraband, the dog sniff was a Fourth Amendment search.

Nor is there any merit to the State's argument (at 19-20) that no Fourth Amendment violation occurred here because law enforcement did not physically enter the home. *See also* U.S. Br. 7, 14-15, 19-20. This Court squarely rejected precisely such an argument in *Kyllo*, holding that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where (as here) the technol-

ogy in question is not in general public use." 533 U.S. at 34 (citation omitted). *Kyllo* likewise rejected the State's argument (at 21-22) that odors emanating from a home are exposed to the public and thus not subject to Fourth Amendment protection. Rejecting such "a mechanical interpretation of the Fourth Amendment," this Court refused to make a distinction between heat waves that radiated "off the wall" into public view and surveillance that occurs "through the wall." *Kyllo*, 533 U.S. at 35. Such a distinction would be similarly artificial here, where the only difference is that a dog sniff detects odors, rather than heat, emanating from the inside of a house.

Finally, the State (at 23-24) and the United States (at 18-19) incorrectly contend that because dogs are not "technology," their use cannot be a search equivalent to the thermal-imaging device in *Kyllo*. To be sure, a dog is not a machine. But that fact has no constitutional significance. "[T]echnology" merely means "the practical application of knowledge" or "a capability given by" such practical application. *Merriam-Webster's Collegiate Dictionary* 1210 (10th ed. 1993). And trained narcotics-detection dogs are "sense enhancing" technology in the sense relevant to *Kyllo*: They are "not in general public use" and reveal "details of the home that would previously have been unknowable without physical intrusion." 533 U.S. at 40; *see also United States* v. *Jackson*, 2004 WL 1784756, at *3 (S.D. Ind. Feb. 2, 2004) (finding "no constitutional distinction between the use of specially trained dogs and sophisticated electronics

from outside a home to detect activities in or contents of the home's interior").[8]

Moreover, the use of dogs to detect contraband is a recent phenomenon. Although dogs have been used to *track* fugitives and prey for centuries, "[a]lmost all *detection* functions are relatively recent, most dating after 1970." Ensminger, *Police and Military Dogs* 4 (2012) (emphasis added). As the United States acknowledges (at 19), the use of dogs to detect narcotics is no exception, also having begun around 1970. *See* Ensminger at 5 tbl. 1.1; Simmons, *The Two Unanswered Questions of* Illinois v. Caballes, 80 Tul. L. Rev. 411, 428 (2005). Accordingly, the ratifiers of the Fourth Amendment would not have contemplated the use of dog sniffs to detect items present in a private home, let alone considered it a common or accepted practice. Permitting the government to use specially trained detection dogs to reveal what is concealed inside a private home—just like using a thermal-imaging device for the same purpose—would unacceptably dilute the "degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34.

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[8] Indeed, the 2002 version of "the White House's Office of National Drug Control Policy discusses detection dogs and lists them as 'Non-Intrusive Technology,' and ... the government describes detection dogs as 'technology' in other project materials as well." Lunney, *supra*, at 893; *see id.* (describing the government's "intended goal of creating a 'worldwide gene pool' for substance-detection canines").

C. This Court's Previous Dog-Sniff Cases Involved Much Less Significant Intrusions On Privacy Interests

As discussed above, amici submit that characterizing narcotics-detection dogs as binary contraband detectors is incorrect; dogs can and do convey information about the interior of a sniffed house, car, or container other than the presence or absence of drugs. But recognizing that a dog sniff is a search does not end the Fourth Amendment inquiry. Rather, the question becomes whether, under the circumstances, the sniff is "unreasonable." That judgment is informed by the nature and quality of the infringement on privacy caused by the sniff, as well as by the law-enforcement interest at stake.

The practice the Court is asked to approve here—suspicionless dog sniffs of a private home—works a far greater intrusion on the privacy interests at the heart of the Fourth Amendment than the dog sniffs that previously came before the Court. To begin with, none of this Court's previous cases involved the home, where, as already explained, Fourth Amendment protection is at its zenith. *See, e.g.*, *United States* v. *Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985) ("[A] practice that is not intrusive in a public airport may be intrusive when employed at a person's home.").

Moreover, in each of this Court's previous cases, there had been a prior seizure of the object to be sniffed, and the question was whether the addition of the dog sniff could convert a lawful seizure into activity barred by the Fourth Amendment. In *Place*, the Court stated that a dog sniff, by itself, did not transform a "*Terry*-type investigative stop"—conducted after "an officer's observations lead him reasonably to believe

that a traveler is carrying luggage that contains narcotics"—into an unlawful one. 462 U.S. at 706, 709. Similarly, in *Edmond*, the Court stated that a dog sniff of the exterior of a car stopped at a traffic checkpoint "does not transform the seizure" into an unlawful search. 531 U.S. at 40. Finally, in *Caballes*, the Court emphasized that "[t]he question on which we granted certiorari is narrow: 'Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle *during a legitimate traffic stop*.'" 543 U.S. at 407 (citation omitted; emphasis added). The Court noted that "the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation" before concluding that the additional intrusion it caused "does not rise to the level of a constitutionally cognizable infringement." *Id.* at 409.

In each case, therefore, an intrusion on the defendant's privacy interests—the seizure of the defendant or his property—had already occurred before the dog sniff took place. In *Place* and *Edmond*, the seizure itself was invalidated; in *Caballes*, this Court addressed only the constitutional significance of the marginal additional intrusion caused by subjecting a lawfully seized car to a dog sniff. By contrast, the dog sniff here encroaches far more deeply on Fourth Amendment interests. There was no prior lawful seizure; rather, the State contends that it is free to pry into the interior of a home via a narcotics-detection dog whenever and wherever it likes, for any reason or no reason. The potential deleterious effect on privacy is accordingly much greater.

These are differences of which the Fourth Amendment takes account by asking whether a particular search is "unreasonable." Rather than accepting the

State's invitation to disregard the Fourth Amendment altogether, this Court should recognize that the privacy interests that dog sniffs implicate will vary depending on the context. *See Karo*, 468 U.S. at 716 ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."); *cf. Dow Chem.*, 476 U.S. at 237 n.4; *Karo*, 468 U.S. at 721; *Knotts*, 460 U.S. at 282. Outside the context of the home, some dog sniffs based on less than probable cause might be reasonable if the marginal intrusion into privacy interests is small and the governmental interest served is compelling. But a suspicionless sniff designed to furnish information about the interior of a private house—information that may indicate the presence of licit or illicit substances—cannot be reasonable if this Court is to maintain the "bright," "firm line" the Fourth Amendment has always drawn at the threshold of the home.

II. Allowing Suspicionless Dog Sniffs Of The Home Would Seriously Weaken The Fourth Amendment's Protections

Allowing suspicionless dog sniffs of the home, even if the immediate intrusion seems minimal, would do serious violence to Fourth Amendment protections over time. Because "illegitimate and unconstitutional practices get their first footing ... by silent approaches and slight deviations from legal modes of procedure," this Court must be vigilant to ensure that increasingly aggressive governmental practices do not chip away at citizens' constitutional rights. *Silverman* v. *United States*, 365 U.S. 505, 512 (1961) (internal quotation marks omitted).

In the Fourth Amendment context, this Court has emphasized the importance of taking the "long view" to prevent seemingly small-scale intrusions of the home from leading to increasingly serious encroachments in the future. *Kyllo*, 533 U.S. at 40 ("While it is certainly possible to conclude ... that no 'significant' compromise of the homeowner's privacy has occurred, we must take the long view[.]"). As in *Kyllo*, the "long view" in this case requires protecting the basic expectation of privacy in the home—and the warrant requirement that is its primary guardian—against developments in law enforcement that threaten to "erode the privacy guaranteed by the Fourth Amendment." *Id.* at 34.

By requiring officers to articulate probable cause before conducting a search, the warrant requirement ensures that tactics used by police to detect intimate details of the home are not abused. *See Karo*, 468 U.S. at 717 ("Requiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search."). Removing that protection from homes where the tactic is a dog sniff, however, would open the door to suspicionless, dragnet-like sweeps of residential neighborhoods, contrary to well-established Fourth Amendment principles. *See id.* at 714 ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant .... Our cases have not deviated from this basic Fourth Amendment principle.").

Contrary to the contentions of the State (at 27) and the United States (at 29) that these concerns have "not materialized," law-enforcement officials in some areas have begun to use detection dogs to conduct suspicionless sweeps of residential neighborhoods and

apartment buildings. For instance, in 2011, federal and state authorities using drug-detection dogs seized items during a random, early morning sweep of a Virginia apartment complex. Morrison, *Items seized in 2 a.m. drug search*, Roanoke Times, July 26, 2011, at 3 ("If the dogs alerted on an apartment, ... officers could knock on the door or request a search warrant."). In addition, the Fargo, North Dakota, police department recently announced that it will use drug-detection dogs to perform indiscriminate sniffs of at least five public housing complexes. Wallevand, *Fargo Housing Authority to begin drug sweeps on properties*, WDAY TV (Mar. 26, 2012)[9]; *Dog to sniff for drugs in Fargo public housing*, Bismarck Trib., Mar. 27, 2012, at B1 ("If the dog smells drugs on a specific door, Fargo police may request a warrant to search the apartment unit.").

Such suspicionless sweeps of residences also pose the risk of selective and discriminatory law enforcement that exists whenever police discretion is unchecked. *See Payton*, 445 U.S. at 582 n.17 ("Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control[.]"). In particular, such unchecked discretion could result in dog sweeps of residences based on nothing more than an officer's inarticulable intuition or subconscious prejudice and consequently could "jeopardize[] the rights of often marginalized people, such as members of minority groups and those who reside in less affluent neighborhoods." Levenson, *A Missed Opportunity to Protect the Individual's Right to Privacy in His Home Under the Maryland Declaration of Rights*,

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[9] *Available at* http://www.wday.com/event/article/id/61188/.

65 Md. L. Rev. 1068, 1083 (2006). But under the State's proposed rule, any home at any time could be subject to sniffing by a narcotics-detection dog, for any reason including the bare desire to harass.

There is no merit to the responses of the State (at 27-28) and the United States (at 29-30) that law enforcement will refrain from suspicionless dog sweeps out of a desire to act responsibly, due to limited resources, or as a reaction to "community hostility." As an initial matter, this Court has made clear that it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010); *see also City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988). Moreover, to the extent that suspicionless sweeps are targeted at lower-income, disenfranchised neighborhoods, "community hostility" will likely be insufficient to prevent such intrusions. And as discussed above, limited resources have not prevented some law-enforcement officials from engaging in arbitrary sweeps of homes, and such sweeps of schools are already commonplace. *See, e.g.*, Lewin, *Drug Dogs Sniff Even 6-Year-Olds*, N.Y. Times, July 26, 2002, at A19; Federico, *Drug-Sniffing Dogs To Search School*, Hartford Courant, Feb. 15, 2012, at B9.

These risks reaffirm the need for this Court's long-standing insistence that, before a home may be searched consistent with the Fourth Amendment, a neutral magistrate, rather than a police officer in the field, must determine that probable cause exists and issue a warrant. *See Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (probable cause supporting a warrant must be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out

crime"). Relaxing this requirement, even for what initially may appear to be an insignificant intrusion into the home, ultimately "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Id.*

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Supreme Court of Florida.

Respectfully submitted.

JONATHAN D. HACKER
CO-CHAIR, SUPREME COURT
AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

NORMAN L. REIMER
MASON C. CLUTTER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L Street, N.W., 12th Floor
Washington, D.C. 20036
(202) 465-7658

DANIELLE SPINELLI
Counsel of Record
ANNIE L. OWENS
MADHU CHUGH
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,

v.

JOELIS JARDINES,
Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF THE NATIONAL POLICE CANINE ASSOCIATION AND POLICE K-9 MAGAZINE AS AMICI CURIAE IN SUPPORT OF PETITIONER

Arthur T. Daus III
2417 N.E. 22nd Terrace
Fort Lauderdale, Florida 33305
[Tel.] (954) 242-5584
Ted.Daus@PoliceK-9Magazine.com
Counsel for *Amici Curiae*

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INTEREST OF AMICI CURIAE[1]

Police canine handlers, all across the United States, have an ardent interest in combating illegal narcotics. Drug detection dogs perform a crucial service for law enforcement related to these efforts. Police K-9 Magazine is a national publication with a 20,000 person readership that covers every state in the union. Most of those law enforcement officers are canine handlers that have a vested interest in the issue before the court. Police K-9 Magazine has a training and consulting branch in which they organize national training seminars throughout the United States in efforts to better educate law enforcement on the proper use of drug dogs. They are the leader in the industry in the area of police canine usage providing invaluable information to federal, state, and local canine law enforcement.

The National Police Canine Association is a large organization consisting of police canine handlers from all across the country. The association governs,

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[1] Pursuant to Supreme Court Rule 37, amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent was granted by both the Petitioner and the Respondent and their consent letters have been filed with the Clerk of Court. This brief was authored solely by counsel for the amici and funded solely by the amici.

sets standards, and certifies police work dogs for their membership. Upon passing their independent certification, police dogs are certified that they are well trained and have the unique ability to locate the source of existing narcotic odor. The National Police Canine Association is headquartered out of Arizona. Moreover, this case is of particular interests to the Association due to the fact that they seek to represent not only the national membership but also specifically their members located in the State of Florida which will be directly impacted by this Courts action.

The amici have a substantial interest in this Court's determination of whether the Florida Supreme Court has decided an important federal question in a way that conflicts with the established Fourth Amendment precedent of this Court by holding that a dog sniff outside the front door of a suspected marijuana grow house by a trained narcotics detection dog is a search under the Fourth Amendment requiring probable cause. The Magazine and all law enforcement officers and canine handlers in all fifty (50) states, along with the National Police Canine Association, have a distinct interest in the correct disposition of this matter.

SUMMARY OF THE ARGUMENT

Given the fact that a "sniff" by a well trained and certified narcotics odor detection dog is not a search, this Court should hold that a lawfully present police officer at the front door of a house, is permitted to merely allow his trained canine partner to use it's God-given olfactory ability to detect the odor of an illegal substance simply seeping through the seams of the door. Police officers are allowed to approach the front door of a residence. This area of the home is not off limits to the general public and therefore is not off limits to law enforcement. Home owners allow a myriad of people access to this area of their home on a regular daily basis. This includes the court authorized police technique of "**Knock and Talk**", where law enforcement officers are allowed to walk up to a house (being lawfully present) knock on the front door of a home, wait for an answer and have a consensual encounter with the home owner. Since Florida law permits this type of front door contact of a home owner, then it goes without saying that the contact by the officers in question is not only lawful but also sanctioned under Florida law. Therefore, their lawful presence at the front door with their canine partner would not, in the eyes of the law, change their legally recognized lawful status.

A well trained and certified narcotics odor detection dog is not a technological advancement. A dog is not a man-made mechanical device, recently created in order to detect the odor of illegal substances. The use of dogs and their unique olfactory talents to smell has been around for hundreds of years. Additionally, a drug dog's nose will only divulge the existence of the odor of an illegal substance. Comparing the recently enhanced, man-made, mechanical thermal imaging device to the God-given sense of smell of a canine is truly comparing apples to oranges, and that square peg will not fit into the round hole no matter how hard the Respondent pounds.

This Honorable Court should find that a dog is not a mechanical technological advancement under the law. The use of the canine's ability to smell odor from the outside of the home does not invoke any Fourth Amendment rights on a home of a marijuana grower simply because the fruits of his illegal trade allow that odor to seep through the seams of a door thereby exposing his illegal activity. This Court should reverse the Florida Supreme Court's decision in *Jardines* as well affirm the other Florida District Courts of Appeal in *Nelson* and *Stabler,* that all have held, that along with the above stated arguments, that a exterior "sniff" of a front door of a house is not a search and therefore, invokes no Constitutional protection.

ARGUMENT

A DOG "SNIFF" OUTSIDE THE FRONT DOOR OF A SUSPECTED MARIJUANA GROW HOUSE BY A TRAINED NARCOTICS DETECTION DOG IS NOT A SEARCH REQUIRING PROBABLE CAUSE WITHIN THE MEANING OF THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION

This Honorable Court has held on three separate occasions that a "sniff" by a well trained odor detecting narcotics canine is not a search. In *United State v. Place, 462 U.S. 696 (1983)*, held that the "sniff" of the luggage of an airport passenger was not a "search" within the meaning of the Fourth Amendment. The information obtained through the use of the dog revealed only the presence or absence of illegal narcotic odor that the dog was trained to detect. This Court again noted the talents of the trained canine were permissible when "sniffing" a car in *Indianapolis v. Edmond, 531 U.S. 32, 40, (2000)* noting that the "sniff" only discloses the mere presence or absence of illegal narcotics odor which is a contraband item. In *Illinios v. Caballes, 543 U.S. 405, (2005)*, this Honorable Court continued the philosophy that the use of well trained odor detecting narcotic dogs used to "sniff" only the odor of contraband was legally permissible. The Florida Constitution states that the Fourth Amendment

right of our State Constitution shall be construed in conformity with the United States Constitution, as interpreted by the United States Supreme Court. *See Art.I, Sec. 12, Fla. Const.*

STATE AUTHORITY

The first case in the State of Florida to touch upon the issue of narcotics odor detection dogs being present at a door and sniffing the drug odor seeping out of the door seams was *Nelson v. State, 867 So.2d 534 (Fla. 5th Dist. Ct. App. 2004).*

Factually in *Nelson,* a registration clerk for the Holiday Inn called the police to report that Nelson had registered as a guest of the hotel. The clerk testified at the suppression hearing that a lot of guests were complaining about drug trafficking at the hotel and that suspicions are aroused when someone fits a certain profile. The profile includes the location and type of room in the hotel, payment in cash, nervousness and the fact that the registering guest is a local resident.

The Police Department was familiar with Nelson since he had been involved in several drug investigations in the past and was currently the target of an ongoing drug investigation. With the permission of the hotel management, a K9 officer took his narcotics sniff dog to the hotel and walked the hallway outside of Nelson's room. The dog was

asked to sniff all room entrance doors in the hallway, but the dog alerted only at Nelson's door. The information was then included in an affidavit to obtain a search warrant. The affidavit included the history of the dog who had been a narcotic detection dog for the Palatka Police Department for the past three years. The dog had over 200 documented narcotics finds and was trained to detect the odor of cocaine as well as several other substances. The K9 officer also provided a detailed listing of the dog's experience and training. After a search warrant was issued to search Nelson's room, police officers entered the unoccupied room and found several small plastic bags of cocaine that through subsequent testimony were tied to Nelson. *Nelson, supra.*

The Florida Fifth District Court of Appeal astutely followed this Court's precedent holding that the odor of contraband is not protected when it is merely escaping through the door of a constitutionally protected area, the defendant's hotel room. They went on to find that this type of information (the escaping odor) developed from such a sniff is entirely appropriate when used to support a search warrant. This is the analogous set of facts and circumstances as the case at bar.

The Florida First District Court of Appeals has also followed precedent of this Honorable Court in their analysis of this issue in *Stabler v. State*, 990 So.2d 1258 (Fla. 1st Dist. Ct. App. 2008). Factually in *Stabler*, Officers received information that several people, including the appellant and his girlfriend,

were trafficking cocaine and liquid codeine. Based upon this information, officers initiated surveillance of the Stabler's residence and his girlfriend's apartment. During the surveillance of the appellant's residence, officers observed the appellant leave in a vehicle driven by another subject. The officers followed the vehicle and conducted a stop. During the stop, a police drug dog alerted to the odor of drugs in the vehicle. A search of the vehicle revealed a baby bottle of what appeared to be liquid codeine. With his consent, officers subsequently searched Stablers residence but found no evidence of drug trafficking. *Stabler, supra.*

During this time, officers continued surveillance of the appellant's girlfriend's apartment. During the surveillance, officers interviewed the manager and other residents of the apartment complex. The manager and the other residents reported that the appellant's girlfriend lived in the complex and that the appellant was often present. They also reported that the appellant and other suspicious subjects often came and went late at night, staying only a short time and sometimes switching vehicles. The front door of the apartment was open to public access and to a common area. Officers brought a police drug dog to the front door of the apartment and it alerted to drugs. Officers also took the dog to the front door of another apartment in the complex where it did not alert to drugs. *Stabler, supra.*

Based upon the information they had gathered during their surveillance of the apartment, officers

prepared a probable cause affidavit and subsequently received a search warrant for the apartment. During the search, cocaine was found. Stabler was arrested and charged with trafficking in 400 grams or more, but less than 150 kilograms. The Florida First District Court of Appeal held:

> The appellant argues that the trial court erred in denying his motion to suppress because the dog sniff at the front door of the apartment constituted an illegal search under the Fourth Amendment and, thus, could not be used as evidence of probable cause for the search warrant. This contention, however, lacks merit. As pointed out by the State, the United States Supreme Court recently addressed the issue of whether a dog sniff constitutes a search. In *Illinois v. Caballes, 543 U.S. 405, 410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)*, the Court held that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Explicitly reaffirming its prior reasoning that the unique nature of a dog sniff renders it distinguishable from a traditional

search, the Court stated: [T]he use of a well-trained narcotics-detection dog...- "does not expose noncontraband items that otherwise would remain hidden from public view"-during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement. *Id. at 409, 125 S.Ct. 834* (quoting *United States v. Place, 462 U.S. 696, 707, (1983)* (holding that "the particular course of investigation that the agents intended to pursue here-exposure of respondent's luggage, which was located in a public place [airport], to a trained canine-did not constitute a 'search' within the meaning of the Fourth Amendment"). Considering that *Caballes* and *Place* represent the only two cases in which the Court has endeavored to address the dog sniff issue, the reasoning espoused therein is controlling and must guide this Court's ruling in the instant case.

The State of Texas has gone on to examine the direct issue of detecting odor from houses. In *Delosreyes v. State, 853 S.W.2d 684 (Tex. Crim. App. 1993)*, Officer King, assigned to police department's narcotics investigation division, received a phone call from a reliable informant. The informant said he "observed several persons unloading blocks, plastic wrapped blocks from a van, carrying [them] into the residence, 309 West Calvin." Officer King and Officer Smith drove by the address in an unmarked car and corroborated the tip. They could see one person in the back of a van, and another person carrying a one-foot-cube, plastic-wrapped block into the residence. At the hearing, Officer King identified Delosreyes as the person who was carrying the block. The officers could not tell, from driving by, what was in the block, but Officer King had seen marihuana packed in blocks like that on several occasions before. After driving by several times, the officers found a place where they could keep constant surveillance on the house, and called in a surveillance team. When it became dark outside, Officer King parked his vehicle on another street, got out, and walked up to the West Calvin residence. Officer King walked up to the garage area, "To see if I could detect any smell of any drugs." He sniffed by the edge of the garage door and smelled the odor of "unburned, fresh marihuana." *Delosreyes, supra.*

The Texas Court of Appeals found as follows:

> Appellant argues that, even though in the present case there was no

> fence for Officer King to peer through, there was a closed garage door under which he "sniffed" to detect the odor of marijuana. Appellant takes the position that he had a legitimate, reasonable expectation of privacy with regard to the garage, its contents, and the smells emanating from it.... In the case before this court, Officer King merely walked from the street in front of the house, a short way up the driveway to the garage door, and smelled the marijuana emanating from the garage. The driveway is situated so that ***anyone*** approaching the house would walk up the driveway and pass near the garage in order to get to the front door of the house.... We hold the trial court did not err in concluding that Officer King by his actions, "invaded no privacy interests of any resident of the residence."

The Court of Appeals in *Texas v. Smith, not reported in S.W.3d, 2004 WL 213395 (Tex. Crim. App. 2004) cert. denied by U.S. Supreme Court, 544 U.S. 961, 125 S.Ct. 1726, 161 L.Ed.2d 602 (U.S. 2005)* found the use of a drug dog on a house Constitutionally permissible stating:

> Appellant argues that the drug-dog sniff outside appellant's garage door was an illegal search; therefore, the information obtained from the sniff (*i.e.*, the drug dog's positive alert) was acquired illegally and could not be the basis of a valid search warrant. ...In the instant case, Officer Foose approached appellant's garage by walking up the driveway. The driveway Officer Foose traversed led both to the front of the garage and to the entrance of the house. Like in *Delosereyes, (Supra.)* anyone approaching appellant's house would walk up the driveway and pass near the garage in order to reach the entrance of the house. We conclude that appellant's privacy interests under the United States and Texas Constitutions were not invaded when Officer Foose walked up appellant's driveway to allow a drug dog to sniff appellant's garage door.

The Michigan Court of Appeals also has addressed the same issue of dogs used at the exterior of a house in order to detect the odor of illegal narcotics in, *People v. Jones, 755 N.W. 2d 224 (Mich. App. 2008).* In following the lead of the State of Texas, the

Michigan Appeals Court held in favor of the use of the canine on the home ruling:

> The majority of the federal circuit courts have viewed the *Place* Court's holding as a general categorization of canine sniffs as nonsearches. See, e.g., *United States v. Redd, 141 F.3d 644, 648 (C.A.6, 1998)* holding that a canine sniff of the inside of an apartment was not a search when the canine team was lawfully present in the building); see also *United States v. Roby, 122 F.3d 1120 (C.A.8, 1997); United States v. Brock, 417 F.3d 692 (C.A.7, 2005); United States v. Vasquez, 909 F.2d 235 (C.A.7, 1990).* Similarly, the vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search. (FN4) Binding and persuasive authority convinces us that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused. *Reed, supra at 649;* see also *Place, supra at 709, 103 S.Ct. 2637* (noting that the sniffed luggage was located in a public place), and *United States v. Daiz, 25 F.3d 392, 397*

(C.A.6, 1994)....Here, the canine was lawfully present at the front door of defendant's residence when it detected the presence of contraband. There is no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch. See *People v. Custer (On Remand), 248 Mich.App. 552, 556, 561, 640 N.W.2d 576 (2001)*(under Michigan law, the police can lawfully stand on a person's front porch and look through the windows into the person's home, as long as there is no evidence that the person expected the porch to remain private, such as by erecting a fence or gate). The record contains no evidence that the canine team crossed any obstructions, such as a gate or fence, in order to reach the front door, or that the property contained any signs forbidding people from entering the property. Any contraband sniffed by the canine while on defendant's front porch-an area open to public access-fell within the "canine sniff" rule. Consequently, there was no search in violation of the Fourth Amendment....The canine sniff here was constitutionally sound, not because defendant had no legitimate privacy interest in the contraband,

> which will always be the case in Fourth Amendment disputes over seized incriminating evidence, but because no legitimate privacy interests or expectations were intruded upon by the canine sniff. As indicated in *Place* it is the uniqueness and attributes of a canine sniff that dictate a finding that the Fourth Amendment was not violated in the case at bar.

Thus, following the natural flow of logic from this Courts precedent, the overwhelming majority of state courts have concluded that the dog sniff at the front of a home did not constitute a Fourth Amendment search because it did not violate a legitimate privacy interest.

If the *Amici* could point this Honorable Court to examine the rational of one case, it would have to be the persuasive and well reasoned holding of *Fitzgerald v. State*, 837 A.2d 989 (Md. App. 2003). Judge Moylan masterfully tackled many issues related to narcotic canine search and seizure including the central issue in this case. As Judge Moylan hit the nail on the head with the question that he thoroughly vetted, "**Does the Presence of a Home Transform a "Non–Search" Into a "Search"?**

In 2003, without the benefit or guidance from this Court's 2005 *Caballes* opinion, the *Fitzgerald* court found that:

The smelling, by man or dog, of odors emanating from such protected, albeit lesser protected, repositories of property as automobiles, suitcases, and school lockers does not constitute a Fourth Amendment "search," the appellant maintains strenuously that when the odors emanate from the interior of a home, the Fourth Amendment interests are of a higher order. He argues that adding to the equation the enhanced protection of the home is enough to elevate the dog sniffing into a "search," thereby engaging the gears of Fourth Amendment protection.

The higher level of justification required to satisfy the Fourth Amendment when it applies, however, is not to be confused with the very different issue of whether the amendment applies. Even the enhanced protection of the home is still limited to being a protection against "unreasonable searches and seizures." It is not a protection against non-searches and non-seizures, reasonable or unreasonable.

The *raison d'etre* for treating a dog sniff as a non-search is that the binary nature of its inquiry, "contraband 'yea'

> or 'nay'?," precludes the possibility of infringing any expectation of privacy that society objectively considers to be legitimate. If the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home. It is the criminal nature of the possession itself that takes the activity out from under the protection of the Fourth Amendment, not the place where the possession occurs.

We hold that a sniff by a trained dog, standing where it has a right to be, of odors emanating from any protected place, residence or otherwise, is not a "search" within the contemplation of the Fourth Amendment. *Fitzgerald, supra.*

The *Amici* wishes to stress to this Honorable Court that the Appellate Courts of Maryland, Texas, and Michigan along with the First, Third, and Fifth District Courts of Appeal of Florida have thoroughly vetted this issue. All following this Court's precedent that it is Constitutionally permissible to allow a trained narcotic odor detection dog to sniff a protected area whether it be a suitcase, a car door, hotel door, apartment door or home front door in order to detect the odor of contraband that is escaping the seams.

FEDERAL AUTHORITY

This issue has been considered by many Federal Courts. The Seventh Circuit Court of Appeal in *U.S. v. Brock, 417 F.3d 692 (7th Cir. 2005)* resolved a very similar factual scenario as the case at bar. In *Brock,* the defendant contended that the canine sniff outside his locked bedroom door constituted an illegal warrantless search, and that the warrant to search 3381, which was issued in reliance on that sniff, violated the Federal and Indiana Constitutions. The government argues that the dog sniff was not a search at all because the police were lawfully present inside Brock's residence with Godsey's consent, and Brock possessed no reasonable expectation that his drugs would go undetected. As we have in this case, we have the use of a dog to smell narcotics odor in relation to a home. But in *Brock,* the door in question was actually located ***inside the home itself and was used on the exterior of the bedroom door.***

The Seventh Circuit stayed within the mainstream of American Jurisprudence in finding:

> The Court held in *Caballes* that a dog sniff of a vehicle during a traffic stop, conducted absent reasonable suspicion of illegal drug activity, did not violate the Fourth Amendment because it did not implicate any

legitimate privacy interest. *Id.* at 837-38. The Court explained that, because there is no legitimate interest in possessing contraband, the use of a well-trained narcotics-detection dog that " *only* reveals the possession of narcotics 'compromises no legitimate privacy interest' " and does not violate the Fourth Amendment. *Id.* (quoting *Jacobsen, 466 U.S. at 1123, 104 S.Ct. 1652). Caballes* relied on the Court's opinion in *Place, supra*, which held that a canine sniff of a traveler's luggage in the airport was not a search within the meaning of the Fourth Amendment because the information obtained through this investigative technique revealed only the presence or absence of narcotics. Adhering to this reasoning, the Court held in *Jacobsen* that a chemical field test of a substance found inside a package was not a Fourth Amendment search because the test "merely discloses whether or not a particular substance is cocaine." *466 U.S. at 123, 104 S.Ct. 1652.* As there is no legitimate interest in possessing cocaine, the field test did not compromise any legitimate privacy interest. *Id. see also Edmond, supra*(officers' practice of walking a

narcotics-detection dog around the exterior of each car at a drug interdiction checkpoint does not transform the seizure into a search). This conclusion is consistent with previous decisions of this Court, as well as those of the majority of our sister circuits, which have held that canine sniffs used only to detect the presence of contraband are not Fourth Amendment searches. *See United States v. Vasquez, 909 F.2d 235, 238 (7th Cir. 1990)* (collecting cases) (canine sniff of a private garage from a public alley was not a warrantless search). *Accord United States v. Reed, 141 F.3d 644, 650 (6th Cir. 1998)*(where canine team was lawfully present inside a home, the canine sniff itself was not a Fourth Amendment search); *United States v. Reyes, 349 F.3d 219,224 (5th Cir.2003)* (dog sniff of passengers exiting bus from distance of four to five feet was not a Fourth Amendment search); *United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997)* (defendant's reasonable expectation of privacy in his hotel room did not extend to hallway outside his room, and no warrant was needed to bring trained dog to conduct a narcotics sniff in hallway); *United States v. Lingenfelter, 997 F.2d 632,*

> *638 (9th Cir. 1993)* (canine sniff of a commercial warehouse was not a search because defendant "could have no *legitimate* expectation that a narcotics canine would not detect the odor of marijuana"); *Untied States v. Colyer, 878 F.2d 469, 477 (D.C. Cir.1989)* (dog sniff of a sleeper car from train's public corridor was not a search because it was not overly intrusive and "did not expose noncontraband items that otherwise would remain hidden from view). *Brock, supra.*

In U.S. v. Roby, 122 F.3d 1120 (8th Cir.1997), considered a factually similar incident to the instant case and is persuasive in its analysis, as it relates to the issue raised by *Jardines:*

> Here, Nero [the dog] walked the Hampton Inn's fourth floor hallway. During this walk, he alerted at Room 426, the room occupied by Mr. Roby. Roby contends the dog's detection of the odor molecules emanating from his room is the equivalent of a warrantless intrusion. We find that it is not. The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. *See United State v. Sullivan, 625 F.2d 9, 13 (4th Cir.1980).* Just as evidence in

> the plain view of officers may be searched without a warrant, *see, Harris v. United States, 390 U.S. 2234, 236, 88 S.Ct. 992, 993, 19 L.ed.2d 1067 (1968)*, evidence in the plain smell may be detected without a warrant. *See United States v. Harvey, 961 F.2d 1361, 1363 (8th Cir.1992); See also Horton v. Goose Creek Independent School District, 690 F.2d 470, 477 (5th Cir. 1982);*... Mr. Roby had an expectation of privacy in his Hampton Inn hotel room. But because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far. Neither those who stroll the corridor nor a sniff dog needs a warrant for such a trip. As a result, we hold that a trained dog's detection of odor in a common corridor does not contravene the Fourth Amendment. The information developed from such a sniff may properly be used to support a search warrant affidavit.

Most Recently in *U.S. v. Byle*, 2011 WL 1983355 (slip copy), (M.D. Fla. May 2011). The Judge in the Federal Middle District of Florida astutely rejected the logic of the Florida Supreme Court holding in *Jardines* in it's findings saying, "In each case, the United States Supreme Court held that dog sniffs

are not searches under the Fourth Amendment. The Florida Supreme Court focused on the particular place of the sniff and concluded that, while a dog sniff may not be a search of a vehicle or luggage, it becomes a search when conducted in front of one's home. This Court disagrees ." *Byle, supra.*

Unlike the Florida Supreme Court in *Jardines*, the Middle District in *Byle* followed this Court's precedent holding "Without belaboring all of the myriad chameleonic situations that could shift a dog sniff from "not a search" to a "search" within the proscription of the Fourth Amendment, this Court accepts the Supreme Court meant what it said—a dog sniff is not a search." *U.S. v. Byle*, 2011 WL 1983355 (slip copy), (M.D. Fla. May 2011).

In agreeing with the premise in *Byle*, the 2011 Nova Law Review article thoroughly examined the *Jardines* search and seizure aspect of a dog sniff. After assessing the relevant law and logically vetting the issue, the author reached one inescapable conclusion "by focusing so strongly on the importance of the privacy of a home, **the Supreme Court of Florida, overlooked—and noticeably ignored—the holdings of the Supreme Court of the United States** that a person has no legitimate privacy interest in contraband." (*Emphasis added*) Abigail Brown, *Something Smells Afoul: An Analysis of the End of a District Court Split*, 36 Nova L. Rev. 201, 225-226 (2011).

The overwhelming number of judicially authored cases, from both state and federal courts all across the country, should guide this Honorable Court to the same logical conclusion the vast number of well educated minds have reached. A sniff is not a search. Drug odor is surely not Constitutionally protected when purely escaping from inside one's home through the seams of the front door of the house. Therefore, the action of law enforcement, in this case, trigger no Fourth Amendment safeguards and this Honorable Court should find the police officers actions lawful.

Similar to the Respondent's argument in the instant case, the defendant in *Brock* attempted to distinguish these cases by relying on *Kyllo* for the proposition that an individual has a far greater privacy interest inside a home, particularly inside a bedroom, than one has in a car or public place. *Brock, 417 F.3d at 659.* However, the court explicitly rejected this assertion, stating that *Kyllo* did not support the defendant's position. *Brock, 417 F.3d at 696.* Although *Kyllo* did reaffirm the importance of the privacy interest in one's home, the Seventh Circuit was primarily influenced by the subsequent clarification of *Kyllo* in *Caballes:* "[I]t was essential to *Kyllo's* holding that the imaging device was capable of detecting not only illegal activity inside the home, but also lawful activity.... As the Court emphasized, an expectation of privacy regarding lawful activity is 'categorically distinguishable' from one's 'hopes or expectations concerning the

nondetection of contraband....' " *Brock, 417 F.3d at 696* (quoting *Caballes, 543 U.S. at 409-10, 125 S.Ct. 834);* Abigail Brown, *Something Smells Afoul: An Analysis of the End of a District Court Split*, 36 Nova L. Rev. 201, 221 (2011).

As many courts, both state and federal have held, the age old use of dogs and their God given ability to smell better than humans has been recognized in the law for well over a 100 hundred years. *See, Pedigo v. Commonwealth, 44 S.W. 143 (Ky. App. 1898) and State v. Hunter, 56 S.E. 547 (N.C. 1907).* This Honorable Court should find that the Canine's nose is not advanced technology. A "sniff" of a home would only divulge the presence of marijuana, cocaine, heroin, or methamphetamine odor and nothing else. In no way, shape or form, would the nose of a dog ever disclose lawful activity inside a home because the dog's nose is simply not trained to reveal the presence of lawfully possessed items.

THE POLICE DOG'S TRAINING AND EXPERIENCE

Factually, in the case at bar, the Miami-Dade police officers obtained a search warrant for the residence in question. Included in the affidavit for search warrant were various factors contributing to the finding of probable cause, one of which was the training and experience of "Franky", the police

narcotics dog.[2] Franky was a well trained and certified narcotics dog. (Pet. J. App. A49-56). As a well trained and certified narcotics dog, Franky would only alert to one of the six odors that he was trained to locate. (Pet. J. App. A49-56). Franky was a passive alert dog (non-aggressive) who's alert to narcotics odor was merely a change of behavior with a final indication of sitting. (Pet. J. App. A49-56) At the time of the sniff, Franky had been independently certified, as a narcotics dog, by the International Forensic Research Institute of Florida International University. (Pet. J. App. A49-56) This method of certification is similar in nature to the manner of certification that is provided by the National Police Canine Association, one of the amici in this case. As of December 5th 2006 (approx. 2 ½ years of service) Franky had been utilized on 656 deployments with narcotics odor being located on 399. *Jardines v. State*, 73 So.3d 34 (Fla. 2011). The record indicates, in the affidavit for the search warrant, that Franky initially completed two training scenarios consisting of first, one 40 hour block of preliminary training through the Metropolitan Police Institute and then second, primary training consisting of 60 days with the narcotics detector canine through the narcotics bureau of the Miami-Dade Police Department. (Pet. J. App. A49-56) The dog then received the first of three yearly (2004, 2005, 2006) independently

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[2] Franky is a Labrador retriever. He is currently enjoying retirement as the family pet for his handler in Miami-Dade County Florida.

certifications with Florida International University as a narcotic canine. (Pet. J. App. A49-56) Not to mention, the weekly maintenance training that is conducted on a regular basis that keeps the dog up to standards throughout the three year period. (Pet. J. App. A49-56) This means that on 257 deployments no odor was detected and therefore no search was conducted nor was the owner even contacted related to the non-alerts. These owners never even knew of the sniff of their property nor did the sniff impact their daily lives in any way shape or form. In fact, owners of homes never know that the police are using a narcotics dog on their home while the sniff is being conducted because the police, as in the case at bar, merely sniff the door without anyone knowing. The only way for a homeowner to even know that their house was sniffed by a narcotics dog is after the search warrant has been read to them related to their illegal grow house that has been discovered. Franky's positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana" at the time of the sniff in this case. *Jardines*, supra. Franky was a truly talented drug dog and served the law abiding citizens of Miami-Dade County well. (Pet. J. App. A-54)

The amici wish to impress upon this Honorable Court that it is not their position that an alert to a home in and of itself, standing alone, is enough for probable cause to search one's home. Therefore, the argument that police officers will be wondering the myriad of residential streets in the United States in order to locate front doors with narcotics odor is ludicrous. Law enforcement in this country has neither the time nor the man power to aimlessly meander door to door like the ***Fuller Brush Man*** in mere hope of making a sale. The dog is being used across the country not to start investigations but has a tool to further them. As in the case at bar, the sniff should be allowed as one factor, among multiple factors, in a search warrant that could persuade a neutral and detached magistrate to issue a search warrant for a residence. The mere use of a dog on the front door of the house, itself, is not a search invoking the protections of the Fourth Amendment.

CONCLUSION

Police K-9 Magazine and the National Police Canine Association argue to this Honorable Court that the Florida Supreme Court errored when it ignored long standing precedent holding that an exterior sniff by a trained and certified narcotics dog, of a home's front door, was a search within the plan meaning of the Fourth Amendment The legal philosophy propounded by the Florida Supreme Court is on a legal island virtually all by itself. The Respondent, as in Greek mythology, is trying to lure this Honorable Court close to this preverbal island with its siren song only to have this Court crash into the unseen rocks surrounding the island. The Magazine and The Association urge this court to sail past this island to the shores of mainstream American jurist prudence and reverse the Florida Supreme Court by finding that a sniff is just a sniff and carries no Fourth Amendment protection.

Respectfully submitted,

Arthur T. Daus III
2417 N.E. 22nd Terrace
Fort Lauderdale, Florida 33305
[Tel.] (954) 242-5584
Ted.Daus@PoliceK-9Magazine.com
Counsel for *Amici Curiae*

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-564

Supreme Court FILED JUL 2

In The Supreme Court of the United States

FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

John W. Whitehead
Counsel of Record
Rita Dunaway
Douglas R. McKusick
Charles I. Lugosi
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888
johnw@rutherford.org

Counsel for Amici Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTION PRESENTED

1. Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because we are committed to ensuring the continued vitality of the Fourth Amendment. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many have ignored in their desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

A decision reversing the court below would constitute a major step toward the establishment of a police state by allowing police to use trained narcotics detection dogs to invade the sanctity of the home without a warrant.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT

Important policy considerations militate against the sanctioning of warrantless "sniffs" by narcotic detection dogs at the perimeter of private homes. In light of the demonstrated lack of reliability of dog sniffs in this context, this Court's ruling should ensure that dog sniffs do not become proxies for findings of probable cause to search private homes—the most sacrosanct enclave of privacy known to man.

Moreover, an understanding of contemporary research and analysis of dog sniffs in this context reveals that such sniffs do constitute "searches" under the Court's existing Fourth Amendment jurisprudence for at least two reasons. First, studies show that this kind of dog sniff is likely to reveal private information about residents apart from the mere presence of contraband inside the home. Second, the amount of time typically required for a dog to complete this type of search exceeds the length of time during which a form of implied consent allows members of the public to attend one's front door for the purpose of making deliveries or inquiries of the owner. Thus, a typical dog sniff will necessarily convert an officer's presence on private property into a trespass and therefore violate Fourth Amendment norms.

ARGUMENT

I. Important policy considerations militate against warrantless "sniff" searches of the perimeter of private homes by narcotic detection dogs.

Data indicate that dogs cannot be expected to reliably detect the presence of narcotics inside a home from a sniff of the perimeter. Both anecdotal evidence and research show, rather, that dogs frequently signal false alerts and show sensitivity to handler bias. In light of the likelihood that a perimeter dog sniff will produce a false positive that results in a search warrant, the Court should require police to obtain a warrant prior to the inception of the perimeter sniff.

Anecdotal Evidence

In 2002, Indiana state police employed a narcotics detection dog after arresting a suspected drug dealer outside a private home. *United States v. Jackson*, 2004 WL 1784756 (S.D. Ind. 2004). Detective Mike Morris led his dog around parked vehicles and the exterior of the residence, and the canine signaled a positive alert for drugs outside the back door of the residence and on a truck that was parked in the driveway. *Id.* at *2. Police then procured a warrant to search the home and the vehicle for drugs, but found no drugs or evidence of drugs. *Id.*

In 1979, 2,780 junior high and high school students were subjected to warrantless sniffs by 14 trained drug detection dogs over the span of two to three hours. *See Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. Ind. 1979). The dogs ran their noses along pupils' legs, actually touching the bodies of the students. Canine alerts identified 50 students, some of whom were subjected to either a pocket search or secondary nude examinations by adults of the same sex. In these 50 searches, 35 students were found to

be innocent, the victims of false positive alerts. In one case, the false alert was later revealed to have resulted from the student's earlier contact with her pet canine, which was in "heat."

These are examples of canine fallibility. As Justice Souter once warned, "The infallible dog . . . is a creature of legal fiction." *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting). Unfortunately, this Court's decisions in *Caballes*, *supra*, and *United States v. Place*, 462 U.S. 696 (1983), have perpetuated the myth of the utterly reliable canine drug sniff. Prosecutors advocate and some judges rule that a dog sniff is not a search for Fourth Amendment purposes because it discloses only the presence or absence of narcotics. But as the examples above and studies examined below demonstrate, this binary theory is mistaken.

Research Data About Canine Narcotics Detection

False alerts are likely to occur when trained canines are given tasks that they are not able or adequately trained to perform. Perimeter sniff searches are immediately problematic, then, because dogs are not naturally suited to detect odors in this manner. Dogs are naturally suited to follow odor trails in a number of ways: by following airborne trails with their heads up in an upwind direction (air scenting dogs); with their heads up when moving into the wind and heads down when following in the same direction as the wind (trailing dogs); or with their heads down and noses on the path, following

footsteps (tracking dogs).[2] However, a drug detection canine has no odor trail to follow when asked to sniff at the front door to a house or when asked to sniff a human being.

There are other complications to consider as well. For instance, odor plumes emanating from cannabis plants within a residence do not disperse in a linear continuous gradient because their dispersal is subject to turbulence.[3] Erratic distribution of odor plumes separated by clean air creates a very complex and dynamic task for a canine.[4] Canine strategy to compensate for signal intermittency coming from an odor plume requires movement upwind to detect flow and odor and a strategy for either maintaining or regaining contact.[5]

In fact, it may simply exceed the capacity of canines to accurately and reliably determine the absence or presence of contraband in this fashion. At least one study has concluded that canines need the information present in five footsteps in order to correctly determine the direction from which an odor plume comes. This, of course, is impossible when the dog is obstructed by a closed front door.[6]

A new double-blind study recently sent shock waves throughout the law enforcement community,

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[2] Peter G. Hepper; Deborah L. Wells, *How Many Footsteps Do Dogs Need to Determine the Direction of an Odor Trail?* Chem. Senses 30:4, 292 (2005) (herein the Queen's Belfast Study).

[3] Queen's Belfast Study, 291-298

[4] Id.

[5] Id.

[6] Id.

shaking pre-existing beliefs that dog alerts are generally reliable.[7] Over the span of two days, 18 trained and certified drug detection canines and their handlers took part in a meticulously prepared experiment to study the influence of handler bias on narcotics detection dogs' performance.

Experimenters told the human handlers that drugs might be present at the testing site, but in fact, there were no contraband drugs in any of the test areas. Thus, any alerts would be false alerts, and zero alerts would be considered a perfect score. Each team completed two five-minute searches in each of four search areas. The results were astonishing. The correct response rate was only 15% (21 clean runs); the error rate was 85% (123 runs).[8] Only one dog of the 18 trained drug detection dogs did not falsely alert.[9]

The Davis Study concluded that the enormous number of false alerts confirmed researchers' hypothesis that handler beliefs influenced the reliability of the trained drug detection dogs.[10]

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[7] Lisa Lit; Julie B. Schweitzer; Anita M. Oberbauer. *Handler Beliefs Affect Scent Dog Detection Outcomes*, Anim. Cogn. (2011) 14:387-394 ("the Davis Study").

[8] Davis Study, p. 390.

[9] Davis Study, Fig. 1, Team 6. Interestingly, no dogs alerted on or around doors where sealed scent containers of marijuana and gunpowder had briefly been placed in plain view of the humans to suggest to the human handlers that authentic contraband was planted for the test runs. Davis study, 393.

[10] Id. at 391.

In general, a dog's performance is not solely dependent on olfactory acuity. Context matters, and the interaction between training paradigm and the nature of the detection problem are cognitive factors that can impact performance.[11] Dogs may thus be conditioned to respond to unintentional human cues. Human cues that direct dog responses without formal training include pointing, nodding, head turning, and gazing. Moreover, in the Davis Study, three handlers admitted to *intentionally* overly cueing their dogs to alert at certain locations.[12]

Courts must understand that even highly trained dogs will respond to both intentional and unintentional handler cues. This inevitability taints the objectivity of the alert performance and imbeds bias in the dog's decision-making and reasoning abilities.[13] Other studies suggest that dog behavior is also affected by handler gender, personality and

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[11] See I. Gazit; A. Goldblatt; J. Terkel, *The Role of Context Specificity in Learning: The Effect of Training Context on Explosives Detection in Dogs*, Anim. Cogn. 8: 143-150 (2005); L. Litt; C.A. Crawford, *Effects of training Paradigms on Search Dog Performance*, Appl. Anim. Behav. Sci. 98:277-292 (2006); L. Litt, *Evaluating Learning Tasks Commonly Applied in Detection Dog Training*, in W. Helton (ed.), *Canine Ergonomics: The Science of Working Dogs* (CRC Press, Boca Raton 2009).

[12] Davis Study, at 392.

[13] A. Erdohegyi; J. Topal; A. Miklosi, *Dog-logic: Inferential Reasoning in a two-way Choice Task and Its Restricted Use*, Anim. Beh. 74: 725-737 (2007).

attentional cues such as eye contact and human eye, head and body orientation.[14]

There is no reported data concerning the reliability and accuracy of perimeter sniffs and alerts by drug detection dogs at private residences, specifically.[15] However, Professor Richard E. Myers II argues that a dog alert should be considered insufficient to constitute probable cause because the "science" of alerting is simply not fully developed.[16] He argues that the true success rate for drug detection dogs is only 16% when false positives are taken into consideration.[17]

Professor Meyers recommends the evaluation of comprehensive data on the use of dogs and their accuracy rates in the field, perhaps using the model used by the U.S. army.[18] He suggests a rigorous national standard for certification and annual

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[14] See K. Kotrschal; I. Schoberl; B. Bauer; A.M. Thibeaut; M. Wendl, *Dyadic relationships and operational Performance of male and female owners and Their Male Dogs*, Behav. Processes, 81: 383-391 (2009); C. Schwab; L. Huber, *Obey or Not Obey? Dogs (Canine Familiaris) Behave Differently in Response to Attentional States of Their Owners*, J. Comp. Psychol. 120:169-175 (2006).

[15] See Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs? Unreasonable Expansion of Canine Sniff Doctrine To Include Sniffs of the Home*, 88 Or. L. Rev. 829, 835-837 (2009) ("Lunney").

[16] See Richard E. Meyers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 14-15 (2006) ("Meyers").

[17] Id., 15

[18] Id. at 33, citing Department of the Army, *Pamphlet 190-12: Military Working Dog Program* (1993).

recertification based on field results, including a consideration of the rate of false positives.[19]

At present, no known private agency specifically trains or certifies drug detection dogs to sniff for contraband located within a building while the animal is outside the building. Drug detection dogs can be trained and certified based upon interior walk-throughs and detection in open areas, such as fields, where drugs are hidden, but not for perimeter sniffs.

The doubt these data and studies cast upon the reliability of narcotics detection by dogs should give the Court great pause as it considers the potential implications of approving warrantless dog sniffs of private homes. A positive alert by a trained dog effectively constitutes a proxy for a finding of probable cause to issue a warrant. In light of the unreliability currently inherent in the type of sniff search at issue, the allowance of these searches absent some independent source of probable cause will result in baseless interference with the most basic privacy rights of countless innocent citizens. Therefore, this Court should ensure that a probable cause finding is required *prior to* the subjection of a citizen's privacy rights to the sort of Russian roulette that this form of dog sniff represents.

II. In light of their demonstrated unreliability and the way in which they are performed, dog sniffs of the perimeters of private homes constitute "searches" for purposes of the Fourth Amendment.

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[19] Id. at 33-34

A. Studies demonstrate that dog sniff searches are likely to reveal private information other than the presence of contraband.

This Court's holding in *Caballes*—that a sniff by a trained narcotics detection dog during a lawful traffic stop was not a search—hinged on the proposition that the dog only alerted to the presence of contraband and that an erroneous alert would not reveal any private information. 543 U.S. at 409. The Court noted that the subject had produced no evidence or findings to support a contrary position. But according to the research cited *supra*, dog sniffs at the perimeter of a home are likely to result in a flood of false positive alerts and the routine granting of search warrants of homes.[20] In fact, it may be impossible for a trained drug detection dog to distinguish the scent of contraband from lawful substances that contain a common ingredient.

For example, acetic acid that is found in pickles and some glue is also found in heroin. There are at least 32 legally prescribed medications that have opioid content. Exposure to air releases the

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[20] In the Davis Study, for instance (conducted inside a building as opposed to outside its front door), the majority of the false alerts focused on an air conditioner, a first aid kit and a wall heater as the source of supposed illegal contraband. (See Davis Study, p. 393, Table 2). These three items are commonly found within private residences.

odor of acetic acid, which will cause a dog to alert, for the same odor emanates from opium.[21]

Methyl benzoate is found in large concentrations in cocaine, and is the ingredient that triggers an alert by a trained drug detection dog.[22] Methyl benzoate dissipates quickly when it is exposed to air, and is reduced to low levels consistent with legal products commonly found in most American homes: solvents, insecticides, first aid kits and perfume.[23] It is not thought to be currently possible for a trained drug detection dog to alert to pure cocaine, because this drug deadens the sense of smell.[24]

It is therefore likely that a trained drug detection dog will alert to the presence of methyl benzoate in any substance, whether legal or illegal. These include, for instance, stacks of circulated U.S. paper currency that is notorious for containing traces of the ingredients of cocaine.[25] Now that the U.S. Food and Drug Administration has approved the use of methyl benzoate in foods as a synthetic

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[21] See Lewis W. Katz and Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735, 755 (2007) ("Katz").

[22] Katz, 755-56.

[23] Lunney 829-39

[24] Id. at 838.

[25] See National Institute of Justice, *U.S. Department of Justice, Guide for the Selection of Drug Detectors for Law Enforcement Applications: NIJ Guide* 601-00, at 6-7, 21(2000); Paul Waggoner et al., *Canine Olfactory Sensitivity to Cocaine Hydrochloride and Methyl Benzoate*, 2937 SPIE 216, 216-217 (1997) ("Waggoner").

flavoring substance, any person with flavored food in their home may also become the victim of a canine false positive alert.[26]

An additional basis for concerns about false positives in a household setting is the fact that experienced drug detection dogs often begin to associate the smells of legal products involved in the seizure of illegal drugs with illegal substances. These include, for instance, baking soda (used as an ingredient to reduce the potency of a drug); re-sealable plastic bags (used to package illegal drugs); air fresheners and coffee grounds (used to conceal the odor of contraband). A trained drug detection dog may therefore alert to baking soda used for cooking and cleaning, re-sealable plastic bags used for packaging lunches, air fresheners used to mask ordinary household odors, and coffee grounds used to make coffee.[27]

Research demonstrates that perimeter dog sniffs are likely to result in false positives that, in turn, will reveal private details of the resident's life other than the existence of contraband. While these details may be as mundane as the location of a first-aid kit in the home or the type of coffee the citizen prefers, they are nonetheless details as to which every citizen has a reasonable expectation of privacy.

B. A perimeter dog sniff is a search because the amount of time required to complete it transforms police presence into a trespass on private property.

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[26] See 21 C.F.R. § 172.515 (2009).

[27] See Meyers, 1-36, 4.

Earlier this year, in *United States v. Jones*, 132 S.Ct. 935 (2012), this Court held that the warrantless installation of a GPS tracking device on a motor vehicle and the use of that device to monitor the vehicle's movements constituted a search. In reaching this conclusion, the Court relied heavily on the fact that the government had "physically occupied private property for the purpose of obtaining information," observing the historically close relationship between Fourth Amendment values and common law property rights. *Id.* at 949-50.

The Court explained the principles at the root of the Fourth Amendment this way:

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave; if he does, he is a trespassor, though he does no damage at all; if he will tread upon his neighbor's ground, he must justify it by law."

Id. (*quoting Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)).

The case of *State v. Morsman*, 394 So.2d 408 (Fla. 1981) articulates the general proposition that an occupant of a home ordinarily does not have an expectation of privacy on a front porch where police officers, salesmen and visitors may appear at any reasonable time to make inquiries. But the arrival of a dog team at the front door to conduct a sniff search for contraband is another matter.

In general, an ordinary visitor enjoys implied permission to inquire at the front door of a private

residence. Such a legitimate visit is typically completed within approximately 30 seconds, after which the property owner either invites the visitor to remain, or the implied permission ends. Assuming that a trained drug detection dog needs more than 30 seconds to determine whether a building contains contraband (from outside the front door), this additional time transforms a lawful visit to an illegal trespass on private property. Because the prolonged presence of a drug detection dog team at a private residence constitutes a trespass, it, too, should be considered a search for Fourth Amendment purposes.

CONCLUSION

Trained drug detection dog sniffs, when done on the perimeter of a private residence, are known to be unreliable and inaccurate. This fact militates against their being used—at the absolute discretion of policy—as a proxy for a finding of probable cause that in turn results in a search warrant.

Moreover, because perimeter sniffs of citizens' homes are likely to reveal private information other than the presence of contraband, and because the time required to complete the sniffs converts police presence into a trespass, these sniffs must be considered searches under existing Fourth Amendment jurisprudence.

The specter of a police dog handler team with supporting armed backup at the front door of a private residence is a chilling scenario indicative of the entrenchment of a growing police state. If this Court permits warrantless dog sniffs of citizens' homes, it will unleash an Orwellian nightmare of

intimidation, leaving no one safe from the prying sniffs of the American Police State.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Rita M. Dunaway
Douglas R. McKusick
Charles I. Lugosi
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Attorneys for *Amicus Curiae*

AMICUS CURIAE BRIEF

No. 11-564

In the Supreme Court of the United States

FLORIDA,

Petitioner,

v.

JOELIS JARDINES,

Respondent.

On Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, IOWA, KANSAS, KENTUCKY, MAINE, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-0596
adam.aston@texasattorneygeneral.gov

COUNSEL FOR AMICI CURIAE

[Additional counsel listed on inside cover]

LUTHER STRANGE
Attorney General of Alabama

MICHAEL C. GERAGHTY
Attorney General of Alaska

TOM HORNE
Attorney General of Arizona

DUSTIN MCDANIEL
Attorney General of Arkansas

JOHN W. SUTHERS
Attorney General of Colorado

JOSEPH R. BIDEN, III
Attorney General of Delaware

DAVID M. LOUIE
Attorney General of Hawaii

LAWRENCE G. WASDEN
Attorney General of Idaho

TOM MILLER
Attorney General of Iowa

DEREK SCHMIDT
Attorney General of Kansas

JACK CONWAY
Attorney General of Kentucky

WILLIAM J. SCHNEIDER
Attorney General of Maine

BILL SCHUETTE
Attorney General of Michigan

JON BRUNING
Attorney General of Nebraska

MICHAEL A. DELANEY
Attorney General of New Hampshire

GARY K. KING
Attorney General of New Mexico

JOHN R. KROGER
Attorney General of Oregon

LINDA L. KELLY
Attorney General of Pennsylvania

PETER F. KILMARTIN
Attorney General of Rhode Island

MARTY J. JACKLEY
Attorney General of South Dakota

ROBERT E. COOPER, JR.
Attorney General of Tennessee

MARK SHURTLEFF
Attorney General of Utah

WILLIAM H. SORRELL
Attorney General of Vermont

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

ROBERT M. MCKENNA
Attorney General of Washington

J.B. VAN HOLLEN
Attorney General of Wisconsin

QUESTION PRESENTED

Whether a dog sniff at the front door of a suspected grow house by a trained drug-detection dog is a Fourth Amendment search requiring probable cause.

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INTEREST OF AMICI CURIAE[1]

All States have a keen interest in combating illegal drugs, and detection dogs play a vital role in these efforts. Florida's brief is correct that the Florida Supreme Court's decision jeopardizes the States' ability to use this crucial tool to discover illegal drugs prior to their distribution. Pet. Br. 26–28. Amici States thus have a distinct interest in the correct disposition of this matter.

SUMMARY OF ARGUMENT

The use of a drug-detection dog to sniff the front door of a suspected marijuana grow house does not constitute a Fourth Amendment search. The Florida Supreme Court's decision to the contrary conflicts with the Court's decisions that have consistently upheld the use of detection dogs. And nothing in the Court's recent decision regarding GPS devices suggests a new approach to the Fourth Amendment claim in this case. The Florida Supreme Court's decision, which jeopardizes a widely used method of detecting illegal drugs, should be reversed.

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1. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4.

ARGUMENT

I. THE DECISION BELOW JEOPARDIZES A WIDELY USED METHOD OF DETECTING ILLEGAL DRUGS THAT THE COURT HAS REPEATEDLY UPHELD.

The Court has repeatedly held that the use of a detection dog to determine whether narcotics are present does not constitute a Fourth Amendment search. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (investigation of a vehicle during a traffic stop); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (investigation of a vehicle at a drug checkpoint); *United States v. Place*, 462 U.S. 696, 707 (1983) (investigation of a traveler's luggage). The Court explained that the use of detection dogs is "much less intrusive than a typical search" and that "no other investigative procedure . . . is so limited both in the manner in which the information is obtained and in the content of the information revealed." *Place*, 462 U.S. at 707; *see also Edmond*, 531 U.S. at 40 (noting that a dog sniff of a car is "much less intrusive than a typical search") (citation omitted). Moreover, in criticizing one law enforcement agency's *failure* to use a detection dog, the Court explained that the practice is one that can *provide* the probable cause needed to justify an arrest, *Florida v. Royer*, 460 U.S. 491, 506 (1983), rather than one that *requires* probable cause.[2]

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2. This Court has recognized that a law enforcement officer's sense of smell can provide probable cause supporting the issuance of a warrant. *United States v. Ventresca*, 380 U.S. 102, 111 (1965) ("A qualified officer's detection of the smell of mash has often been held a very

Naturally, given the Court's clear guidance, state and federal officials routinely use drug-detection dogs during their investigations. For example, in Texas, the Department of Public Safety deploys more than 20 dog–handler teams across the State, and these teams routinely perform more than 1000 sniff tests annually.[3] Arizona's Department of Public Safety likewise deploys more than 25 canine teams.[4] And in 2010, the Virginia State Police Department's 18 narcotic teams led to 118 arrests and 127 drug seizures.[5] Local law enforcement

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strong factor in determining that probable cause exists so as to allow issuance of a warrant."); *Johnson v. United States*, 333 U.S. 10, 12–13 (1948) (noting that a federal agent smelling the "distinctive" and "unmistakable" odor of burning opium may be sufficient probable cause to obtain a warrant and describing that evidence as likely "to be evidence of [the] most persuasive character"). A detection dog's sense of smell should be treated no differently under the Fourth Amendment.

3. *See, e.g.*, Texas Department of Public Safety, 2001 Annual Report at 11, *available at* http://www.txdps.state.tx.us/director_staff/public_information/annrep2001.pdf; Texas Department of Public Safety, 2002 Annual Report at 9–10, *available at* http://www.txdps.state.tx.us/director_staff/public_information/annrep2002.pdf.

4. *See* Canine Unit, *available at* http://www.azdps.gov/About/Organization/Highway_Patrol/Canine/.

5. Virginia State Police, Annual Report: 2010 Facts and Figures, *available at* http://www.vsp.state.va.us/Annual_Report.shtm.

agencies also often deploy their own detection teams. And the States often coordinate with federal authorities, just as the local authorities did in this case.

The Drug Enforcement Administration (DEA) has established the Domestic Cannabis Eradication / Suppression Program (DCE/SP) to target marijuana cultivation nationwide.[6] In 2010, that program resulted in the eradication of more than 4,700 indoor grow sites in 46 States.[7] And the federal government routinely uses detection dogs during its investigations. In 2000, the Department of Justice issued a guide for selecting detection dogs. That report noted that the U.S. Customs Service alone had more than 600 canine teams in service. U.S. Department of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for Law Enforcement Applications (2000) at 21.[8] The report also touted the success of the canine program, noting that in one year, 9,220 seizures of narcotics and other drugs (at an estimated value of $3.1 billion) were made as a result of detections by U.S. Customs Service canines. *Id.* at 22.

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6. Domestic Cannabis Eradication / Suppression Program, *available at* http://www.justice.gov/dea/programs/marijuana.htm.

7. 2010 Domestic Cannabis Eradication / Suppression Program Statistical Report, *available at* http://www.justice.gov/dea/programs/marijuana_seizure_results.pdf.

8. This report is available at https://ncjrs.gov/pdffiles1/nij/183260.pdf.

It is thus evident that the use of detection dogs has been a common practice for state and federal authorities for quite some time. The decision below substantially undermines these critical state and federal efforts.

As Florida's brief demonstrates, the Florida Supreme Court's decision that the use of a detection dog is a Fourth Amendment search requiring probable cause is based upon its misapplication of *Caballes*, *Edmond*, *Place*, and *Kyllo v. United States*, 533 U.S. 27 (2001). Pet. Br. 13–18. The Florida Supreme Court attempted to distinguish the Court's dog-sniff cases by stating that the "minimally intrusive" nature of the investigations in those cases does not apply to an investigation of a home. *Jardines v. State*, 73 So.3d 34, 44–45 (Fla. 2001). But an officer walking a detection dog up to the front porch of a home to determine what can be smelled in that area is not intrusive. After all, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also Florida v. Riley*, 488 U.S. 445, 449 (1989) ("[T]he police may see what may be seen from a public vantage point where [they have] a right to be.") (internal quotation omitted). The officers were unquestionably permitted to approach the front door of Jardines's residence. *See Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) (noting that when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"). And while they were standing on the porch, the officers were unquestionably

permitted to use their senses in an attempt to determine whether marijuana was being grown within the house. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(c), at 575–77 (4th ed. 2004); *id.* at 575–77 n.89–98 (collecting cases). This does not change merely because a detection dog also approached Jardines's front door.

The Florida Supreme Court is plainly incorrect that the sniff test conducted at Jardines's front door was a "vigorous and intensive" procedure, *Jardines*, 73 So.3d at 46, or an "intrusive procedure," *id.* at 49.[9] Contrary to the Florida Supreme Court's view, there was *no* intrusion during the front porch sniff test, much less a "substantial government intrusion into the sanctity of the home." *Id.* at 49. There was thus no basis for the Florida Supreme Court's refusal to follow *Caballes* and the Court's other dog-sniff cases.

In an attempt to bolster its dubious conclusion regarding the use of a detection dog, the Florida Supreme Court stated that the presence of additional law-enforcement officials maintaining a perimeter

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9. The Florida Supreme Court's reference to an "intrusion" into the home, *id.* at 36, demonstrates its fundamental misunderstanding of the Fourth Amendment—"physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *Michigan v. Summers*, 452 U.S. 692, 701 n.13 (1981) (citation omitted). *See also Groh v. Ramirez*, 540 U.S. 551, 559 (2004) ("[S]earches and seizures *inside* a home without a warrant are presumptively unreasonable.") (emphasis added) (citation omitted).

around the house—which that court called "a sustained and coordinated effort by various law enforcement departments"—contributed to the Fourth Amendment violation. *Id.* at 48.

Contrary to the Florida Supreme Court's view that law enforcement officers maintaining a perimeter during an investigation of this sort are a "public spectacle," *id.*, perimeter officers serve dual purposes. First, they provide for the safety of their fellow officers and the general public. And second, they can help ensure that evidence is not removed or destroyed. It should go without saying that officers may remain in public view while they serve these functions; officers are permitted to "freeze" the situation while other officers obtain a warrant. *See Illinois v. McArthur*, 531 U.S. 326, 337 (2001) (An officer's refusal to allow defendant to enter his trailer without a police officer until a search warrant was obtained did not violate the Fourth Amendment.); *Segura v. United States*, 468 U.S. 796, 798 (1984) (Officers may secure the premises to preserve the status quo while obtaining a warrant.).

II. The Court's Recent Decision in *United States v. Jones* Does Not Suggest a Change in the Fourth Amendment Jurisprudence With Respect to Detection Dogs.

In *United States v. Jones*, the Court held that federal authorities' attachment of a Global-Positioning System (GPS) device to a vehicle, and its use to monitor the vehicle's movements for 28 days, was a search under the Fourth Amendment. 132 S.Ct. 945, 949 (2012). In *Jones*, federal agents had obtained a warrant to install a GPS device on Jones's vehicle in

the District of Columbia and within ten days. *Id.* at 948. On the eleventh day, and while the vehicle was parked in a public parking lot in Maryland, federal agents attached the GPS. *Id.*

The Court held that the installation of the device constituted a search, explaining that "[i]t is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information." *Id.* at 949. This was critical, in the Court's view, because of the close relationship between property rights and the Fourth Amendment. Indeed, the Fourth Amendment jurisprudence was "tied to common-law trespass, at least until the latter half of the 20th century." *Id.* at 949–50 (citations omitted); *see also id.* at 950 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."); *id.* at 951 n.5 ("A trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; *and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy.*") (emphasis added). And as a result, for example, the Court has held that "wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because there was no entry of the houses or offices of the defendants." *Id.* at 950 (quotation omitted).

With these principles in mind, the Court explained that federal agents had "encroached on a protected area" of Jones's vehicle and "trespassorily" attached

the GPS device. *Id.* at 952. Thus, the installation of the GPS amounted to a "classic trespassory search" under the Fourth Amendment. *Id.* at 954. Jardines can make no such claim.

As noted above, the Miami-Dade Police officers and the detection dog merely approached the front door of Jardines's marijuana grow house, where they unquestionably had the right to be. *See King*, 131 S.Ct. at 1862. No trespass, and therefore no search, occurred. *See Jones*, 132 S.Ct. at 951 n.5 ("[T]he obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy."). Rather, the officers and the detection dog merely observed the smell of marijuana emanating from the house and onto the front porch. And "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Ciraolo*, 476 U.S. at 213 (quotation omitted).

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If the Florida Supreme Court's decision is upheld, it could have a profound chilling effect on law-enforcement efforts to combat illegal drugs. The Court should instead reverse the judgment below to ensure that detection dogs retain their proper place at the forefront of state and federal efforts against the production and distribution of illegal drugs.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-0596
adam.aston@texasattorneygeneral.gov

COUNSEL FOR AMICI CURIAE

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